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Mr. Loveland was appointed Clerk of the U. S. Circuit Court of Appeals for the Sixth Circuit on October 2d, by Judges Taft, Lurter and Severence.

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ST. LOUIS, MO., OCTOBER 19, 1894.

The excellent address of Alexander Martin, President of the Missouri State Bar Association, at its recent meeting, called attention to three modern abuses governing the administration of justice, one of which is especially reprehensible. He spoke of the abuse of the process of injunction in State courts and recently by the federal judiciary, and of the unreasonable increase in the bulk and the authority of case law. Upon the former subjects there may be ground for fair differences of opinion, but there can be none in reference to the rapid accumulation of decisions of courts and the growing tendency to ignore principles and search for cases, which abuse constitutes the main object of Mr. Martin's attack. He reminds us that over twenty thousand decisions are rendered each year, forming about two hundred volumes of reports annually. Twenty thousand decisions this year, twenty thousand next year, "while in the dim and inexorable past they rise in mountainous altitudes, range after range, till they extend beyond the vision of the most resolute and enterprising explorer." As he very aptly says, we have gone on for centuries in England and America, accepting the decisions of the courts as binding precedents for our guide in applying legal principles in the determination of controversies in the courts, until the decisions which constitute our guide have become too numerous for casual perusal, while synthetical study and scientific classification are seldom attempted. Notwithstanding this, the necessity of citing them in every important controversy is felt to be imperative, however imperfectly it may be done. We have, upon more than one occasion in these columns, said something by way of criticism of this rapidly growing abuse, but the words of Mr. Martin will have especial weight, in view of his prominence and ability as a jurist and in the domain of legal education.

The following, from the address of Mr. Martin, we commend to the profession and to the judges of courts, as expressing in apt words, the grave abuse inveighed against: "What the courts have said in a similar state of facts is the principal thing demanded of the trial judge, who expects to be relieved by the attorneys from all independent thought and investigation, by the citation of a case precisely in point. A failure to produce a goodly array of decisions is apt to be treated by the judge as a neglect of duty, as conduct bordering on an attempt to impose extraordinary labor on him. Then, again, when decisions supposed by the attorney to be in point are cited, a judge who decides according to what he deems to be the correct principles governing the case, but in the face of decisions standing on all fours, runs the risk of being regarded as presumptuous and unprofessional. When there is a conflict in the decisions on the same or a similar state of facts, the jurist is encouraged to adopt the mechanical contrivance of adding up the decisions *pro* and *con*, and following the lead of the majority under the persuasion that it represents what he is pleased to call the weight of authority. This practice of following the precedents of adjudged cases as distinguished from the principles directly or indirectly involved in them, results in clothing the concrete case with the fiat of authority and diverting the attention from the principle upon which it should have been, if not actually, determined. The labor of the advocate is too often exhausted in a citation of adjudged cases resembling as nearly as possible the facts of the case on trial, without the slightest effort to reach, or furnish the court, a rule by which it should by governed. Under this practice the judge is invited to part intimacy with primotorial principles and rules, to throw himself back in his easy chair and ask for a decision on identical facts. If the suit relates to the sale of a mule, a decision on the sale of a horse would not be ignored; but the learned judge would feel safer if he could be enabled to follow the lead of a "mule" case. In the constructions of statutes and the provisions of constitutions, the plainest language counts for nothing against an inconsiderate and hasty decision of the appellate court. As soon as the decision is rendered, the text of the statute or constitution fades from sight and the decision alone is recognized and followed in place of it, until the appellate court has an opportunity, and

sees fit, to reverse its interpretation. These decisions of the court are, in theory, only declarations of the existing common and statute law; but the uncertainty of such law as disclosed in the reports and ill-advised statutes does not unfrequently render the utterance of the judiciary equivalent to imperative legislation. All the more necessary, therefore, is it that judges should familiarize themselves with principles rather than precedents, to the end that their decisions may command the respect and obedience due to the science and logic of an enlightened system of jurisprudence, in preference to that which is blindly accorded to arbitrary and contradictory cases."

Mr. Martin points out a solution of the difficulty and a means whereby material improvement in the science of jurisprudence may be effected. He contends that all benefits, in that direction will have to be in unifying and moulding its principal rules into one harmonious whole. "This," he says, "will not be attained by the revising committees of seventy day legislatures; nor by bookmakers, whose highest aim is to furnish new cases to practicing lawyers; nor by judges, who become objects of commiseration when a controversy before them threatens to extend beyond the domain of adjudicated cases. It may come, as it came to the Roman law, through the life efforts of superior jurists, devoted exclusively to scientific investigation and generalization. The State and national governments can do much to advance the work, which must proceed on historical lines, making intelligent and effective use of the vast storehouses of material which has been piled up in them for ages. The increased interest taken of late years in the cultivation of American jurisprudence as a science, is evidenced by the establishment and maintenance of law schools in every part of the nation. Over six thousand students are attending these schools. They would exist for a useless purpose if they merely follow the declarations of the courts, and made no effort to emancipate the legal mind from the thraldom of erroneous and injurious precedents. Scientific investigation of principles must go hand in hand with successful instruction, until the student is convinced that the law he studies is a harmonious system of principles and not a congeries of decisions. These principles must be mirrored in his mind, instead of the decisions, which may or may not contain a correct enunciation of them. Nothing but a familiar hold on those principles can save him from the bewilderment and discouragement of conflicting decisions. Indeed, it is only the lawyer that has mustered the scientific principle, who is capable of making a proper use of judicial precedents in his capacity as either advocate or judge. The successful lawyer of the future will not be a case lawyer. My belief is that in twenty years, the species will become extinct, like those of the dodo."

NOTES OF RECENT DECISIONS.

FEDERAL JURISDICTION — COMMON LAW — CARRIERS — INTERSTATE COMMERCE — FOLLOWING STATE DECISIONS.—The United States Circuit Court for the Northern District of Iowa in Murray v. Chicago & N. W. Ry. Co., 62 Fed. Rep. 24, decided the following interesting points:

1. The adoption of the constitution of the United States and the consequent creation of the national government did not abrogate the common law previously existing; nor did the division provided for by the constitution, of governmental powers and duties between the national and State governments, deprive the people of the benefits of the common law; as to such matters as thereby were committed to the control of the national government, there were applicable the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter, the common law applicable to such matters being based on the common law of England, as modified by the surroundings of the colonists, and as developed by the growth of our institutions since the adoption of the constitution, and the changes in the business habits and methods of our people; and the binding force of the principles of this common law, as applied to such matters, is not derived from the action of the States, and is no more subject to abrogation or modification by State legislation than are the principles of the law of nations or of the law of maritime.

2. The constitution of the United States and congress, acting in furtherance of its provisions, have conferred on the Supreme Court and the other courts inferior thereto the right and power to enforce the principles of the law of nations, and the law maritime, of the system of equity, and of the common law, in all cases coming within the jurisdiction of those courts, applying, in each instance, the system in which the nature of the case demands; and, as to all matters of national importance over which paramount legislative control is conferred upon congress, the courts of the United States have the right to declare what are the rules of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto.

3. In determining the obligations assumed by a

common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action; and, in an action for damages for charging unreasonable rates for transportation from one State to another, shipments made before the adoption of the interstate commerce act are governed by the common law, and those made after the adoption of that act by the common law as modified by the act.

4. The fact that the subject of interstate commerce is beyond State legislative control does not *ipso facto* prevent the courts of the State from exercising jurisdiction over cases arising from such commerce.

5. The conclusion of a State court as to the time when a cause of action accrues in case of fraud or concealment, based, not on a construction of the State statute, but on the view taken on the rule of the common law, is not binding on the United States courts, when called on to construe the common law and apply its principles to cases arising between citizens of different States.

CONTRACTS—ILLEGAL CONSIDERATION—RESCISSION.—In Springfield Fire & Marine Ins. Co. v. Hull, 37 N. E. Rep. 1116, the Supreme Court of Ohio hold that a contract, the consideration of which, in whole or in part, is the suppression of a criminal prosecution, is without any legal efficacy, either as a cause of action or as a defense to an action not founded on or arising out of the agreement, and that the rule that a party who would rescind a contract must restore what he has received under it, does not apply to contracts founded on an illegal consideration, and void for that reason. In certain cases, where applicable, the rule is satisfied if the judgment sought will substantially restore the party to the situation he was in when the agreement was made; as, when money paid by him is less than he justly owed the other party, and the same is credited, and the action brought for the balance. Where a person is induced by threats of a groundless prosecution to accept a less sum than is justly owing to him on a policy of fire insurance in satisfaction of his claim, and to surrender the same, he may maintain an action on the policy for the balance due, without returning or tendering back the money so received. The court say in part:

It is not disputed that a contract, founded upon a consideration which, in whole or in part, is illegal, immoral, or against public policy is void, and will not be enforced at the instance of any party to it; but it is contended that rule cannot avail the plaintiff, because the contract of compromise was executed by the payment of the sum agreed upon, and the surrender of the policy, and was, therefore, notwithstanding its infirmity, a bar to the action. We think not. The rule is that the court will not assist either party to such a contract to enforce it against the other, or to recover what he has parted with under the contract; and the test in determining when it applies to a plaintiff is whether his cause of action is founded on or arises out of the illegal agreement. If the action is of that character, whether it appear from his own stating or is shown by way of defense, he must fail; otherwise not. The plaintiff's action was upon the policy of insurance, which, it was admitted, was issued by the defendant, and was without taint or blemish. The destruction of the property insured was total; so that, under our statute, the amount owing to the plaintiff was fixed and certain, being the amount for which the policy was in force when the fire occurred. Rev. St. § 3643; Insurance Co. v. Leslie, 47 Ohio St. 409, 24 N. E. Rep. 1072. The petition, to which a copy of the policy is attached, contains all the necessary allegations to entitle the plaintiff to recover upon it; and upon proof of those that were denied, to the satisfaction of the jury, the plaintiff was entitled to their verdict, unless the alleged compromise agreement set up in the answer should be established and enforced against her. Her cause of action was not founded on, nor did it arise out of, that agreement. She predicated no claim to recover upon it, nor in any way sought its enforcement, or the recovery of anything she had parted with under it. On the contrary, the defendant set it up by way of defense, and sought to make it effectual against the plaintiff, who controverted its validity on the ground that it was illegal, and had been obtained by duress. We see no reason why the plaintiff might not pursue that course. She was not obliged to first bring an action to set aside the agreement, and compel the return of the policy so wrongfully obtained from her, or set out in her petition the facts contained in the answer and reply. They were not a part of her case. The agreement was a matter of defense which might or might not be pleaded; and the necessity of pleading it, as well as the burden of proving it, was on the defendant. Larimore v. Wells, 29 Ohio St. 13. The plaintiff was not required to anticipate the defense, and assail the agreement in the petition; and when set up in the answer it was none the less open to attack by her than it would have been if made the foundation of an action against her; nor, when attacked, can it be more effective in the one case than in the other. The party asserting it in either way as the ground of a right which he is seeking to enforce must be defeated because of its illegal character. "An instrument may be shown to be void and without legal existence or efficacy, as for want of consideration, or for fraud, or duress, or incapacity of the parties, or any illegality in the agreement." 2 Pars. Cont. (8th Ed.) 670. And that is so whether the instrument be pleaded as a cause of action or as a defense to an action not rising out of the agreement. In the case of Roll v. Raguet, 4 Ohio, 400, and 7 Ohio, 76, the actions were upon instruments given for an unlawful purpose; in the former case on promissory notes, and in the latter on a mortgage executed to secure the notes, which were given for the sole consideration that a criminal prosecution against one of the makers should be suppressed. In each of the cases the plaintiff failed because his cause of action was founded upon the illegal contract. The plaintiff in the case of Moore v. Adams, 8 Ohio, 372, sought to have a deed executed by him set aside on the ground that it was made in consideration that he should not be prosecuted for an alleged crime of which the grantee accused him. The illegal character of the agreement, and the plaintiff's connection with it, were alleged in his bill, and constituted the only ground for the relief he prayed for; and it

was held no relief could be granted him on such a cause of action. Upon the same principle the plaintiff in Thomas v. Cronise, 16 Ohio, 54, and Kahn v. Walton, 46 Ohio St. 195, 20 N. E. Rep. 203, were denied the remedy sought in those cases. And in Hooker v. De Palos, 28 Ohio St. 251, which was an action to recover back money paid in the part performance of an illegal agreement, the plaintiff was defeated on the same ground. In all of these cases, and others of like character, where the plaintiff failed to obtain the relief he desired, his cause of action was founded upon or arose out of the illegal transaction, and in that important and decisive feature the case before us is distinguished from them.

It was held in James v. Roberts, 18 Ohio, 548, that a court of chancery will restrain the collection of a note and mortgage procured by threats of a groundless prosecution. The court, in distinguishing that case from Roll v. Raguet, *supra*, say, that in the latter "Raguet agreed that he would not only not prosecute, but would use his influence to prevent a prosecution, and that he would not appear as a witness against the accused." The doctrine of the Roll Case is recognized, but in holding that it did not apply to the James Case the court say, "that James was entirely innocent of the crime charged against him, and that was known to all parties concerned; that the charge was got up merely for the purpose of extorting money from him by operating upon his fears; and that, fearing the consequence of the prosecution, notwithstanding his innocence, he executed the note and mortgage." And, further, that "a true public policy requires that all groundless prosecutions should, if possible, be prevented, and that every facility shall be afforded to the innocent to escape from such a calamity; and we think an innocent party may, with great propriety, ask to be relieved from the consequences of a groundless charge." While this case does not overrule that of Moore v. Adams, *supra*, or even refer to it, we regard it as containing important qualifications of the doctrine of that case, which are sustained by well-considered adjudications elsewhere, among them: Heckman v. Swartz, 50 Wis. 267, 6 N. W. Rep. 891; Atkinson v. Denby, 6 Hurl. & N. 778, 7 Hurl. & N. 933, 30 Law J. Exch. 361; Hullhorst v. Scharner. 15 Neb. 57, 17 N. W. Rep. 259. A party who in the free exercise of his faculties enters into an unlawful agreement, does not stand in precisely the same position as one who executes such a contract under duress. There is no contract without the consent of the parties to its terms, and there is no consent when the free agency of one party is overcome; and it can be of no practical consequence whether it be overcome through fear of loss of life, or of limb, or through fear of imprisonment. The latter may be as potent as either of the others, and, with some individuals, more so. Nor can we think a sound rule requires that the threat of either should, in all cases, be such as would operate upon persons of ordinary firmness, and inspire in them a just fear. The question in each case must be whether the person threatened was deprived of his freedom of will, and that is a question of fact, in the determination of which regard should be had to the nature of the threats, the sex, age, and condition of life of the party, and the attending circumstances. In the proper application of the rule to the record before us, we are not prepared to say the jury was not authorized to find that the agreement relied on as a defense was procured from the plaintiff by duress, and therefore void. In that event, she was not *in pari delicto*, and under the authority of James v. Roberts, *supra*, might, if necessary, have maintained an action to set it aside. But, as has already been shown, that was unnecessary. The plaintiff might, as she did, resist the agreement on the ground that it was illegal, when set up in defense to her action.

CONSTITUTIONAL LAW—CORPORATE POWERS—SPECIAL ACT.—One of the many points decided by the Supreme Court of Arkansas in Keel v. Board of Directors, etc., 27 S. W. Rep. 590, is of special importance. It is held that an act of the legislature conferring corporate powers on a body of citizens appointed to build and maintain a levee, but who have no personal or private interests to subserve, and are simply required by the State to superintend the work, is not in contravention of Const. art. 12, § 2, which provides that the general assembly shall pass no special act conferring corporate powers, except for charitable, educational, penal, or reformatory purposes, where the corporation created is to be under the patronage and control of the State. Norton, Special Judge, and Wood, J., dissented. Bunn, C. J., says:

The most important question in this case, and the one most difficult of solution, is that raised by the contention that the legislature, in conferring corporate powers upon the appellees, disregarded the inhibition of section 2, art. 12, of the constitution. The particular contention is that the inhibition is against conferring corporate powers by special act on public as well as private corporate bodies. We will not enter upon a construction of that section, to show to the contrary, since, from our view of the case, it makes little difference whether the section has reference solely to private corporations (as we think is the case), or to both private and public corporations, since, in the latter case, what would be denominated "public corporation" might only be public *quasi* corporations, at best. In fact, we are inclined to think that, under the latest and best rule of construction, acts of the legislature conferring corporate powers upon mere State agencies—bodies of citizens who have no personal or private interests to be subserved, but are simply required by the State to do some public work—are not acts conferring corporate powers, such as are referred to in the constitution. The principle of construction here referred to is most frequently illustrated in the instances of counties, townships, school districts, and the like. Counties are ordinarily created corporate bodies, in a sense, and yet their corporate powers, in each instance, are necessarily conferred by special acts. They are therefore no longer considered as falling within the inhibitory clause of the constitution. And, if this is necessarily the case with counties, why not with any other agency the State government may choose to employ in the matters of civil government? The object of the restriction was evidently the apprehended abuse of the power conferred. This was the reason of the constitutional restriction. The reason does not exist where the State merely clothes one of its own agencies or instrumentalities with such power. This subject is ably and forcibly presented in Beach v. Leahy, 11 Kan. 23, which was a case wherein the legislature, by

special enactment, conferred certain corporate powers upon a school district. The constitution of that State contained the same provision as ours against conferring corporate power by special acts, without, however, the exception in favor of educational, charitable, and penal or reformatory institutions. Judge Brewer, in delivering the opinion of the court, said: "Does it [the act] conflict with section 1, art. 12? The question here raised is one of much difficulty . . . Section 24 of chapter 92 of the General Statutes provides that any school district organized in pursuance of this act should be a body corporate, 'and shall possess the usual powers of a corporation for public purposes.' The act under discussion is a special act, conferring powers upon this body corporate which it did not possess before. It seems, therefore, to conflict with the letter of this section. A critical examination, however, leads us to the conclusion that this conflict is seeming, and not real, or, perhaps more correctly, leaves our minds so doubtful of the existence of any conflict, that, according to well-settled rules of construction and decision, we must pronounce the law not unconstitutional." The court in that case held that school districts are merely *quasi* corporations, because "they are primarily political subdivisions; agencies in the administration of civil government; and their corporate functions are granted to them the more readily to perform there public duties. The legislature has created the regents of the agricultural college and the regents of the State universities bodies corporate, and given them certain corporate powers. Yet are they thereby inhibited from special legislation concerning them? Giving corporate capacity to certain agencies in the administration of civil government is not the creation of such an organization as was sought to be protected [prohibited] by article 12 of the constitution." Continuing, he said: "The mere fact that these organizations [*quasi* corporations] are declared in the statute to be bodies corporate has little weight. We look behind the name for the thing named. Its character, its relations, and its functions determine its position, and not the mere title under which it passes." To the same effect is the case of State v. Stewart, 74 Wis. 620, 43 N. W. Rep. 947. The principles announced in these decisions, and the numerous authorities cited therein for their support, meet our views on the subject; and the main doctrine therein announced, to the effect that conferring corporate powers by the legislature upon agencies of the State, appointed to perform some public work, in the course of the administration of civil government, in order to the more efficient performance of the duties imposed, is not such an act as is prohibited by the constitution we think, is founded upon sound reason as well as authority. Applying the principle to the case at bar, we think the conferring of corporate power by special act upon the board of directors of the St. Francis levee district is not in violation of the constitution.

ELECTION AND VOTERS—AUSTRALIAN BALLOT SYSTEM—MARKING OF THE BALLOT.—The adoption of the Australian ballot system, in spite of its many advantages, has given rise to a vast deal of litigation over points that had theretofore been pretty well settled; and has also unfortunately called forth many conflicting decisions. The *American Law Register* has the following in reference to some recent decisions upon the vexed question as the marking of the ballot and the consequent validity or invalidity of the vote:

In the most recent case on the subject, Curran v. Clayton, 29 Atl. Rep. 930, the Supreme Judicial Court of Maine held that, under a statute requiring a cross mark in the square at the right of the name of the party, or individual candidate, ballots marked as follows should be rejected: 1. Where the cross mark was placed above the name of the candidate, or not in the appropriate place at the right of it. 2. Where there was a cross mark above, and one below the name of the candidate, but none at the right. 3. Where the cross mark was placed at the left of the candidate's name. 4. Where there was a cross mark under the party name at the head of the ticket, and one at the left of the name of the candidate of another party. 5. Where there was no cross mark, but a straight short line, drawn across the square at the right of the party name at the head of the ticket. 6. Where there was a cross mark in the square at the right of the name of each candidate of one party, with one exception, and a cross mark in the square at the right of the party name on another column.

In all these cases, except the last, there could be no reasonable doubt as to the intention of the voter; but the court, disregarding the plain intention of the statute, which is to give the voter a right to vote freely, without fear of intimidation, or deprivation of his right of free suffrage, deliberately assumed that the sole object of the act was to secure secrecy in voting, and that as the peculiar marks might possibly be used, by prearrangement with the election officers, as a means of identifying the ballot, they were therefore contrary to the spirit of the act, and rendered the ballot void. There never was a clearer instance of the confusion of the means with the end. The intent of the act was to secure a free vote; the secrecy provided for was the most effectual means of securing that freedom. It is little short of absurdity to claim that an independent voter would deliberately furnish means to identify his ballot. But even if he did so, it would be a most roundabout way of accomplishing what he could do by simple word of mouth, without let or hinderance—tell for whom he voted. If secrecy was the only thing desired, why did not the legislature forbid him to disclose his vote orally? But the same misapprehension exists elsewhere, notably in Indiana: Parvin v. Wimberg, 130 Ind. 561, 30 N. E. Rep. 790. The Rhode Island courts are a little more liberal, and while insisting upon a mark to the right of the name, are indifferent to its position, whether within or without the square: *In re* Vote Marks, 17 R. I. 812. The same is the concensus of opinion in the lower courts of Pennsylvania: Louck's Case, 3 D. R. 127; Weidknecht v. Hawk, 13 Pa. C. C. 41; York Election, 13 Pa. C. C. 205.

On other questions they are not agreed. Some hold the cross immaterial, Weidknecht v. Hawk, *supra;* and that it is sufficient to mark the ballot with a perpendicular stroke: Hempfield Election, 14 Pa. C. C. 577, 3 D. R. 499; others insist upon the cross mark as the palladium of their liberties, or the well-known straw which the drowning man trusts to for his salvation, and reject ballots marked with two horizontal lines in the circle intended for the mark: East Coventry Election, 3 D. R. 377. Some admit the validity of a cross mark without the square or circle, if close to

the name of the candidate or party: Louck's Case, 3 D. R. 127; others reject it unless within the circle: East Coventry Election, 377. But the most hopeless conflict is over ballots marked as in the sixth instant in the case under discussion, both after the name of the party and the name of a candidate of another party. Common sense would indicate that the voter intended to vote for that candidate, at any rate, and such has been the decision in some cases: Weidknecht v. Hawk, 13 Pa. C. C. 41; Twentieth Ward Election (No. 2), 3 D. R. 120. Legal acumen, however, which is not necessarily synonymous with law, in its boasted capacity of the perfection of human reason, would have it different, and would reject the vote for that office altogether: *In re* Election Instructions, 2 D. R. 1.

In marked contrast with this futile splitting of hairs and consequent nullification of the legislative intent, is the admirable decision in Woodward v. Sarsons, 10 L. R. C. P. 733, which holds that the main objects of the ballot acts is to secure the carrying out of the intent of the vôter, and that anything that goes to show that intent clearly is a valid marking; and that therefore ballots marked with two crosses, or three, instead of one, with a single stroke, a straight line, a mark like an imperfect P added to the cross, a star, a blurred or ill-marked cross, a pencil line through the names of the candidates not voted for, a cross to the left of the name, and even a ballot paper torn in two longitudinally down the middle, are good. A comparison of the lucid opinion in which this doctrine was asserted with the abortive efforts at special pleading in the cases cited above makes one blush for his country. One American judge, however, has been found with sufficient judgment to approve this decision, and to assert, expressly on its authority, that a ballot without cross marks, but with the names of candidates erased with lead pencil, was to be counted for those whose names were not erased: Coleman v. Gernet, 14 Pa. C. C. 578, 3 D. R. 500.

WATER COMPANIES—LIABILITY FOR INSUFFICIENT SUPPLY.—The Supreme Court of Indiana decide in Fitch v. Seymour Water Co., 37 N. E. Rep. 982, that a water company that agrees to furnish water to a city to extinguish fires is not liable to a private person whose property is destroyed by failure to furnish water as he is not a party to the contract. Howard, J., says:

The cases cited by appellant to show a right of action in favor of an inhabitant of a municipality against an individual or a corporation for the violation of an ordinance of the municipality enjoining an obligation or a duty upon the individual or the corporation, are chiefly cases under police ordinances, being cases where the municipality is but an instrument for carrying out the behests of the State, or cases under ordinances for the improvement and care of streets or like duties, being cases where the control of the municipality was such as to impose upon it an obligation which it consequently owed to the inhabitant for a neglect of duty. But the ordinance in question is not a police regulation, nor one which the municipality was under obligation to enact or enforce. Under the statute the city had a right to enact an ordinance for protection against fire, but it was not bound to do so. In enacting the ordinance, the municipality moved in its governmental capacity, in the general interests of the community. As a means to obtain its object, the city contracted with the company for a water supply. The ordinance, therefore, in so far as the inhabitants of the city and public interests generally were concerned, was a governmental measure, which the city might take or not take, as seemed best; and no liability existed against the city for a failure to enact the ordinance, or for a failure to see that it was duly enforced. There could, then, be no public duty, under the ordinance, the violation of which would render the city, or those appointed to carry out the provisions of the ordinance, liable to any one who might suffer. This, we think, follows from our decisions. Brinkmeyer v. City of Evansville, 29 Ind. 187; Robinson v. City of Evansville, 87 Ind. 334; City of La Fayette v. Timberlake, 88 Ind. 380; Summers v. County of Daviess, 103 Ind. 262, 2 N. E. Rep. 725. It must be, consequently, that if there is liability on the part of the company, it is because of the terms of the ordinance as a contract with the city, in which contract the inhabitants had an enforceable interest. But, while the inhabitants were interested in the contract made for their benefit, we do not think that this interest was such as gave the inhabitants the right to sue for its enforcement, or for damages occasioned by a failure to enforce it. In a like case—that of Davis v. Water-works Co., 54 Iowa, 59, 6 N. W. Rep. 126—the court said: "The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires, and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does other benefits from the municipal government, as the benefits enjoyed on account of improved streets, peace and order enforced by police regulation, and the like. It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They cannot hold such officers and agents liable upon the contracts between them and the city." See, also, Becker v. Water-works, 79 Iowa, 419, 44 N. W. Rep. 694. In Fowler v. Water-works Co., 83 Ga. 219, 9 S. E. Rep. 673, the court said: "It was held in Willy v. Mulledy, 78 N. Y. 310, that the neglect of a duty imposed by statute would give a right of action to any person having a special interest in its performance, and injured by the breach. The present case is not based upon a breach of a statutory duty, but solely upon failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for want of the requisite privity between the parties before the court. A case directly in point is Davis v. Water-works Co., 54 Iowa, 59, 6 N. W. Rep. 126. See, also, Nickerson v. Hydraulic Co., 46 Conn. 24. There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or non-feasance, is no tort, direct or indirect, to the private property of an individual, though he

be a member of the community, and a taxpayer to the government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. Wright v. City Council of Augusta, 78 Ga. 241; 7 Am. & Eng. Enc. Law, 997 *et seq.* We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law." See, also, Phoenix Ins. Co. v. Trenton Water Co., 42 Mo. App. 122; Britton v. Water-works Co., 81 Wis. 48, 51 N. W. Rep. 84; House v. Water-works Co. (Tex. Civ. App.), 22 S. W. Rep. 277; Ferris v. Water Co., 16 Nev. 44; Eaton v. Water-works Co., 37 Neb. 546, 56 N. W. Rep. 201. In Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. Rep. 554, and 13 S. W. Rep. 249, a contrary view is taken, but, while the opinion of the court is a very well considered one, yet we do not feel that its reasonings are sufficient to overcome the strong current of reason and authority in favor of the view which we have taken. We think that under the facts of the case at bar the water company had undertaken no public duty which would make it liable to appellant, and also that appellant, had no privity in the contract of the city with the company. The judgment is affirmed.

CRIMINAL PRACTICE — BURGLARY—VARIANCE—DESCRIPTION OF PLACE.—In State v. Kelly, 29 Atl. Rep. 843, decided by the Supreme Court of New Hampshire, a variance between the description of a house in an indictment charging that defendant at N in the county of H broke and entered the house of C "there situate" and stole therefrom, and evidence that the house was in H in same county is pronounced fatal. The court says:

There are certain crimes and offenses which are not local in their nature. The particular place in which they are committed need not be alleged, or, if alleged, the indictment may be sustained although the evidence shows the offense was committed in some other place in the same county. Simple larceny and an assault are examples of this class of offenses. Accordingly, it was held in Com. v. Lavery, 101 Mass. 207, that the defendant was lawfully convicted of simple larceny committed in Chelsea, although the indictdictment charged that the larceny was committed in a building in Boston, in the same county. So in Com. v. Tolliver, 8 Gray, 386, it was decided that the defendant was lawfully convicted of an assault committed in Chelsea, although the indictment charged the assault to have been committed in Boston. People v. Honeyman, 3 Denio, 121, was an indictment for stealing bank notes. The offense was charged to have been committed in a certain towboat and vessel called "The Clinton," lying and being in the first ward of the city of New York, in the County of New York. A separate count charged simple larceny. The proof was that the vessel was lying in the third ward of the city. The court said: "The place where the vessel lay was stated as venue merely, and, as the offense proved was in the city and county of New York though in a different ward from that mentioned in the indictment, the variance was not fatal. It would have been otherwise if the larceny had been charged as committed in a dwelling house, for that is in its nature local. But it is not so of a ship or vessel. The book cited in People v. Slater, 5 Hill, 401, prove this distinction." In an indictment for an offense in its nature local the allegation of place is a necessary part of the description of the offense, and must be proved as laid. Cases of larceny from a building, burglary, arson, entering and being in a close by night for the purpose of taking game, desecrating a burial place, and of nuisance in a highway, are examples of this class. In People v. Slater, 5 Hill, 401, the prisoner was charged with setting fire to an "inhabited dwelling house of one Peter Lang, situate and being in a certain street called Broadway, in the sixth ward of of the city of New York." It turned out in proof that the dwelling house was situate in the fifth ward of the city. The objection on the ground of variance was held well taken, the place being stated in the indictment by the way of local description, and not as venue merely. "When a place is stated as matter of local description, a variance between the description of it in the indictment and the evidence will be fatal." Archb. Cr. Pl. 41, 97, 107, 108, 264; 3 Chit. Cr. Law, 365; Steph. Pl. 291; Rosc. Cr. Ev. 363. An indictment charged the setting fire to a certain outhouse situate in the parish of W, in the county of N. The proof was that it was situate in the parish of P, in the same county. It was held that the objection on the ground of variance was well taken, and that there was a local description given of the building, which should be proved as laid. Rex v. Woodward, 1 Moody, Cr. Cas. 323. Archibald, in commenting on this case, says: "The parish is material, for it is stated as part of the local description of the house burnt, being referred to by the subsequent words 'there situate.' Therefore, if the house be proved to be situate in another parish, the defendant must be acquitted." Archb. Cr. Pl. 263. In an indictment for wrongfully desecrating a public burying ground, particularly described by metes and bounds, it was held that it was not sufficient to prove that a part of the lot described was a public burying ground, although the acts complained of were committed upon that part. Com. v. Wellington, 7 Allen, 299. It is not, perhaps, possible to reconcile all the authorities upon the point in question; but we think it will be found that the authorities generally affirmed that, where the place is stated, not as venue, but as matter of local description, a variance between the description of it in the indictment and the evidence on the trial will be fatal.

THE PROVINCE OF JURIES IN CRIMINAL CASES.

It is impossible in the space allotted me here to enter into any exhaustive discussion of the much-vexed question whether at the common law juries were judges both of law and fact in criminal cases. I hold the negative, and I shall endeavor by a brief resume of salient features and cases in our legal history and reports to indicate the grounds which have led me to this conclusion. We are sure of one fact to begin with, and it is conceived that a right apprehension of this will greatly

aid us in our inquiry. It is that at the remotest periods of our legal history, juries had the power at their peril to give a general verdict in all cases, civil as well as criminal[1]—that is, to pass incidentally upon questions of law interwoven with the issues they were to try,—and some legal point must always be connected with every issue of fact. Its legal bearings are to be taken from the court and applied by the jury in the determination of the particular case before them and the rendition of their general verdict therein. This power exists for the jury to-day just as it did in the time of Glanville, and can argue nothing in favor of the doctrine under discussion, else, since the power exists everywhere to-day in both civil and criminal cases, the doctrine would obtain as to both classes of cases also. This, of course, is not the fact and it is nowhere contended for. A perfect conception of this power of the jury, and its ineffectiveness as an argument in the premises will readily explain certain passages in the old writers often relied on by advocates of these enlarged rights of juries,[2] and will enable us the more easily to comprehend the true question before us. This question is, then, not has the jury the power to pass on the law involved in the general verdict, but has it the right to do so? or, if one objects, as Justice Sharswood did,[3] that "the distinction between power and right, whatever may be its value in ethics, is very shadowy and unsubstantial,"—is the power of the jury to pass on the law in any case paramount? Clearly even in this way of putting the question our answer must be in the negative, for the court has the power to set aside the verdict of the jury if it is contrary to the law. To this, of course, there is the one exception, that an acquittal is final, and this exception rests not on the doctrine we are disputing but on a fundamental maxim of the common law, embodied in our federal constitution in the words, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[4] Let us examine the authorities, always bearing in mind the true question with which we are dealing and the distinction stated above. The statute of Westminster 2d, ch. 30,[5] gives to jurors the power to render a special verdict in cases of disseisin. It provides that "the justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseisin or not, so that they do show the truth of the deed, and require aid of the justices; but if they, of their own head, are willing to say that it is disseisin or not, their verdict shall be admitted at their own peril." This statute is the foundation of nearly all arguments in favor of the doctrine under discussion, and it is well to have authority on its construction. Lord Coke, commenting on it, says: "In the end it hath been resolved that in all actions, real, personal, and mixed, and upon all issues joined, general or special, the jury might find the special matter of fact, pertinent and tending only to the issue joined, and thereupon pray the discretion of the court for the law; and this the jurors might do at the common law, not only in cases between party and party, whereof this act putteth an example of the assize, but also in pleas of the crown at the king's suit, which is a proof of the common law; for if this act had made a new law and other like cases between party and party had been taken by equity, yet the king had not been bound thereby."[6] The argument drawn from this statute is obvious: 'By it jurors are expressly given the right in one class of cases to render a special verdict and leave all questions of law to the decision of the court. Reasoning along the line of the exception proving the rule, the conclusion is reached that the power of giving special verdicts did not exist at common law, but that on the contrary it was not only the exclusive privilege but the duty of the jury to decide fully all questions of law involved in their general verdict.' The result here is positively and sufficiently negatived by the extract from Lord Coke quoted above. The statute was simply declaratory of a common law privilege of which, in certain cases, the overbearing actions of the justices of assize were seeking to deprive jurors. In addition to this it may be remarked that by the statute

[1] The contention that juries were the paramount judges of the law in civil cases has been long ago abandoned, if, indeed, it ever existed. The grounds of the distinction are not satisfactory. See on this point: Bish. Cr. Proc., Vol. 1, §§ 983, 984.

[2] Bracton, 119; Litt., 368; Coke Litt., 228*a*; Lord Somers, Essay on Grand Juries, 8, 9.

[3] Kane v. Com., 89 Pa. St. 522.

[4] Const. U. S. Amend. Art. V.

[5] 13 Ewd. 1 (1285).

[6] Coke, 2 Inst. 425.

jurors are still to be permitted to give general verdicts "at their peril." It is, indeed, difficult to conceive how, if it were a common law right of juries to pass on the law of the case in their general verdict, a statute which uses the words quoted above can be consistently cited to establish the existence of such right. "The conclusion, therefore," as Mr. Worthington says "seems to follow that the enactment of the statute 2 West. ch. 30, amounts to a positive declaration that the jury cannot lawfully decide a question of law according to their own uninformed judgment."[7] Since they can give general verdicts, they have the power to do so, but no right. And this distinction is by no means shadowy or worthless. In the language of Mr. Justice Ashhurst, "nothing can be more certain than that upon every case where a general issue involves matters of fact and matters of law, the jury may, if they please, find a general verdict; they have the power certainly. If a man has a pistol at your head, he has a power certainly to take away your life; it does not follow he has the right. So it is with respect to the province of the judge and jury. I look upon it the jury have no more right to find against the direction of the judge in a case where a matter of law is concerned than a man would have to take away your life in the manner I have mentioned."[8] Several cases appear in the old reports bearing on this question. They generally refuse their assent to the doctrine.[9] The most important case on the point is, however, that of Rex v. Dean of St. Asaph, *supra*, in which the great Erskine appeared as the champion of this doctrine. The Dean of St. Asaph was prosecuted for libel in 1774 before Justice Buller at *nisi prius*. This judge declared without hesitation that whether the matter charged in the information was a libel or not was a question of law for the court—not for the jury. This opinion was sustained by the whole King's Bench with the exception of Justice Willes. Lord Mansfield, who delivered the opinion of the court, uses language which could hardly be made more emphatic and convincing: "The fundamental definition of trial by jury depends upon a universal maxim that is without an exception. Though a definition or maxim in law without an exception, it is said, is hardly to be found, yet this I take to be a maxim without an exception—'*ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores*'. * * * The jury do not know and are not presumed to know the law; they are not required to do it. Upon the reason of the thing and the eternal principles of justice the jury ought not to assume the jurisdiction of the law. They do not know and are not presumed to know anything of the matter. It is the duty of the judges in all cases, upon general issues, to tell the jury how to do right, though they have the power to do wrong, which is a matter between God and their own conscience. To be free is to live under a government of law. Miserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or (which is the same thing) no certain administration of law, to protect individuals, or to guard the State." In spite of the malignant attacks of Junius, history has acquitted Lord Mansfield of insincerity in this matter and too much weight cannot be given to the deliberate judgment of this great jurist. The result of this case was the Libel Bill of 32 Geo. III, introduced by Mr. Fox, but prepared, as it is supposed, by Lord Erskine, which provides, in substance, that in all trials for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be required by the judge to find the defendant guilty merely on proof of publication and of the averments or innuendoes. But the general rule in England on the question under discussion remains to-day as laid down in Rex v. Dean of St. Asaph, *supra*.

In our own country this doctrine obtained to a much greater extent during the early periods of our history than it does now. This was due, says Smith, C. J., to the fact that "in many of the colonies, immediately preceding the Revolution, the arbitrary temper and unauthorized acts of the judges, holding office directly from the crown, made the independence of the jury, in law as well as act, a matter of great popular importance."

[7] Worth. Jur., 175.

[8] Rex. v. Deen of St. Asaph, 21 How. St. Tri. 847; Worth. Jur., 174.

[9] Throckmorton's Case, 1 How. St. Tri. 901. Wharton's Case, Yelv. 23; Lilburne's Case. 2 Harg. St. Tri. 19, 70; Townshend's Case, Plow. 111; Willion v. Berkley, Plow. 223; Grendon v. Bishop of Lincoln, Plow. 493; Penn v. Mead, 1 Coke. Litt. Harg. Notes, 155*b*; Bushell's Case, Vaughn, 135.

He adds that it "grew into recognition and for some time after the adoption of the federal constitution was generally received;" but he says, "the courts one after another abandoned this doctrine. In England, it has always been held that the court were as much the judges of the law in criminal as in civil cases. And this doctrine is now undoubtedly sustained by the great weight of authority."[10] To the same effect is the diary of John Adams for February 12th, 1771, cited by Mr. Wharton in his remarks on this subject.[11] The cases on both sides of the question are numerous, and, perhaps, the majority of those occurring very early in our history favor the doctrine. Later decisions have generally overruled them, however. It will be well to note some of these. In Com. v. Knapp,[12] and Com. v. Kneeland,[13] the doctrine seems to be held, but it was rejected in the later case of Com. v. Porter;[14] and after some fluctuations of opinion, a legislative enactment and the repeal thereof, Massachusetts appears finally to have rejected the rule. Indeed, in the case of Com. v. Anthes,[15] in 1855, the Supreme Court decided that an act of the legislature giving the jury power to overrule the court on a question of law was unconstitutional. In 1828, an able opinion of Judge Holman, in the case of Townsend v. State,[16] denies this right to the jury, though the dissenting justice in this case, with his subsequent compeers, afterwards reversed Judge Holman's ruling. And such is the law in Indiana now. In U. S. v. Wilson and Porter,[17] Justice Baldwin emphatically pronounces in favor of the doctrine, but in the noteworthy case of U. S. v. Shive,[18] the same eminent judge, doubtless seeing into what uncertainty and anarchy such a rule would lead, limits his previous decision by declaring that juries may not judge of the constitutionality of a statute. And Justice Baldwin has gone as far as any one in claiming enlarged privileges for the jury. The rule he lays down in the latter case is also accepted in the State of Maryland, where the constitution expressly gives the jury the right to judge both the law and the fact in criminal cases.[19] In the libel case of the People v. Croswell,[20] which arose in 1804, Lewis, C. J., charged the jury in accordance with the rule laid down in Rex v. Dean of St. Asaph, *supra*. On a motion for a new trial before the four judges sitting *in banc*, two declared for and two against the doctrine, Kent, J., holding that intent in all cases was an inference of fact and not of law, and further saying that the jury in all cases were bound to resolve the law as well as the fact. In 1843, the question was thoroughly discussed in the case of Pierce v. State.[21] The opinions of the court through Parker and Gilchrist, JJ., are very able in their refutation of the doctrine. The decision has been subsequently affirmed. Judge Thompson is supposed to have held the same views. When asked on one occasion by counsel for the defense to charge the jury that they were the judges of both law and fact, he emphatically replied: "I shan't; they ain't."[22] So Mr. Justice Hunt in the trial of Miss Anthony in 1873.[23] In the case of State v. Croteau,[24] a majority of the court declare in favor of the doctrine. Two elaborate opinions were delivered, one by Hall, C. J., in support, and one by Bennett, J., in denial of this right of the jury. Vermont has adhered to this ruling until the recent case of State v. Burpee,[25] in which the court in an able opinion by Thompson, J., expressly overrule State v. Croteau, *supra*. The case of Kane v. Com.,[26] occurred in 1879. Sharswood, C. J., here declares for the doctrine, but his ruling has been deviated from in the later case of Com. v. Nicholson.[27]

But this doctrine does not generally obtain in this country. Most of the States in which it is established have adopted it in the shape of a constitutional provision or a legislative enactment, and even in these States it would seem that the jury are expected to decide the

[10] Williams v. State, 32 Miss. 389.
[11] John Adam's Life and Works, 252; Whar. Cr. Pl. & Pr. § 806.
[12] 10 Pick. (Mass.) 496.
[13] 20 Pick. (Mass.) 222.
[14] 10 Met. (Mass.) 263.
[15] 5 Gray (Mass.), 185.
[16] 2 Blackf. (Ind.) 156.
[17] 1 Bald. (C. C.) 99.
[18] 1 Bald. (C. C.) 510.
[19] Franklin v. State, 12 Md. 236.
[20] 3 Johns. (N. Y.) Cas. 337.
[21] 13 N. H. 536.
[22] 1 Cr. Law. Mag. 52.
[23] U. S. v. Anthony, 11 Blatchf. 200.
[24] 23 Vt. 14.
[25] 65 Vt. 1 (1892).
[26] 89 Pa. St. 522.
[27] 96 Pa. St. 503. See, also, in this connection: 1 Crim. Law Mag., 47; and also the late case of Com. v. McManus, 143 Pa. St. 64, and particularly the concurring opinion of Mitchell, J., therein.

law under the direction of the court, and, indeed, that such is their duty, the distinction between power and right being generally recognized.[28] The federal courts all reject the doctrine.[29] The reasons advanced in support of the rule are believed to be unsound. It is possible that in troublous and dangerous times in the Mother Country, when political prosecutions were rife and tyrannical, the effect of this rule obtaining may have been for good. Such may also have been the case in the early days of our own history for somewhat analogous reasons; but it is conceived that these dangers have passed away in the light of our present civilization, and particularly under our republican form of government. Judges are no longer. if they were ever, the slaves of the appointing power, with the law in whose hands the accused could not secure justice. Our judges are independent, able and fearless. The prisoner need fear them far less than the impressionable material of which juries are usually composed. Political prosecutions are the only ones in which a judge may be thought likely to have a bias, and these are almost unknown among us. The reason therefore ceasing, the rule should cease. Its time for usefullness has passed. If is already practically abolished. Let us discard the theory also. The objections to the rule are numerous. It is unsustained by authority as I have endeavored to show, and it is opposed to the fundamental principles of our jurisprudence. It destroys that element in our common law which is justly deemed one of its greatest merits, and which, more than anything else, favorably differentiates it from its great rival, the civil law—I mean its quality of certainty, the result of one of its fundamental maxims that 'precedents must be followed unless flatly absurd or unjust.'" "Juries," in the language of C. J. Wade,[30] "make no precedents. They appear and pronounce a decision that is arbitrary, irrevocable, and that cannot be questioned or re-examined. They disappear and make no sign." That stability in our laws which all have a right to expect, and particularly those arrainged for crimes, can never exist if every twelve men selected for the trial of each particular case can decide the law connected therewith. We would have as many interpretations of the law as there are juries. Uncertainty and confusion would be the inevitable result. Our criminal law would be a chaos. All positive legislation could be nullified and judicial legislation would cease to exist. The juries would bring to their responsible tasks a slight fund of general information, as is usually the case, minds untrained in the legal profession, unable to appreciate a subtle distinction, and often of such a temper as can be swayed this way or that according to the arguments of opposing counsel. Is their any possibility of their decision being correct? Can any chances be more slender? And yet, if they are the paramount judges of the law, if this doctrine means anything, their decision cannot be subject to review. Who would not refuse their assent to this at once? And, indeed, wherever the doctrine is held, their decision is subject to review in the case of a conviction. The doctrine then would seem to be a mere theory, a shadow. Let us put it away in either case.

Grave doubts are beginning to be felt among us as to the unalloyed merits of the jury system. It is certain that confidence in its excellence is being weakened in some quarters. It is equally certain that some ground for this exists. The more power which is placed in the hands of the jury, the more ground will there be for apprehension, the louder will be the complaints of those who oppose the system, the greater the danger of its disappearing. To those of us who yet believe that trial by jury is one of the best legacies which the common law has bequeathed us, this change in our judicial system would be pregnant with danger and dismay. Let us not hasten this castrophe. Let us prevent it. Let us preserve intact the initial principles of our jurisprudence, chief among them that which relegates a question of law to the court, a question of fact to the jury. Let us keep the provinces of these two great arbiters in our judicial system forever and inviolably apart. This is the true way, for this alone is in accord with reason, with established authority, with individual liberty, and within the greatest good to the state.

Baltimore, Md. WARD B. COE.

[28] State v. Hopkins, 56 Vt. 263; State v. Ford, 37 La. Ann. 443; Mullinex v. People, 76 Ill. 211; Davidson v. People, 90 Ill. 221; Habersham v. State, 56 Ga. 61; Sweeney v. State, 35 Ark. 585.

[29] Stettinius v. U. S., 5 Cr. C. C. 573; U. S. v. Morris, 1 Curt. C. C. 23; U. S. v. Riley, 5 Blatch. 204; U. S. v. Greathouse, 4 Sawy. 457; U. S. v. Keller, 19 Fed. Rep. 633; and particularly the opinion of Judge Story in U. S. v. Battiste, 2 Sum. 243.

[30] 3 Cr. Law Mag. 492.

RECEIVER APPOINTED BY FOREIGN COUNTRY—RIGHT TO SUE.

MOREAU V. DU BELLET.

Court of Civil Appeals of Texas, May 30, 1894.

A receiver appointed by a court of a foreign nation cannot bring an action in Texas as such receiver.

RAINEY, J.: On May 1, 1891, appellant instituted suit in the Fourteenth Judicial District Court, at Dallas, against the appellee. Appellant, by his original petition, alleged that he was a citizen of Paris, Republic of France; that the Societe Fonciere et Agricole des Etats Unis is a private corporation incorporated under and by virtue of the laws of the Republic of France; that appellant is the duly appointed and qualified liquidator of said corporation, and has been since November 4, 1882, at which time he was duly appointed such liquidator by a court of competent jurisdiction in France; that as such liquidator he has full power and authority to manage and control the affairs of said corporation, adjust all its business, and sue for and collect all its debts due to it, and to control the collection of all debts due to it. Appellant further alleged that appellee had possession of certain books, papers, etc., belonging to said corporation; that he fraudulently represented himself to be the agent of said concern, was collecting money belonging to same, and appropriating it to his own use, etc. A *mandamus* was prayed for, requiring appellee to bring the books, papers, etc., into court; and an injunction was prayed for, enjoining him from "assigning or negotiating said notes, accounts, books, papers," etc. These prayers were temporarily granted. The appellee, among other things, answered by a plea in abatement, in substance: "That plaintiff sues as liquidator of the Societe Fonciere et Agricole des Etats Unis, and that such office of liquidator is unknown to the laws of Texas; that said petition does not show the order of any court appointing plaintiff as said liquidator, or giving him authority to sue as such liquidator; that plaintiff appears from the face of said petition to have been appointed and to be now acting as liquidator by a foreign court, having no jurisdiction over the property claimed by plaintiff, and whose authority is not recognized by the laws which govern the court." Defendant further pleaded that said appellant was appointed as such liquidator of said Societe, etc., by an order of a court of the Republic of France, being the tribunal of commerce of the department of Seine, holding court at Paris, Republic of France, and, as the creature of said foreign court, appellant had no standing in the courts of the United States or of the State of Texas; that said power did not empower plaintiff to sue either in France or elsewhere,—which said plea was sworn to by defendant. On hearing the court sustained said plea in abatement, and, appellant declining to amend, said cause was dismissed at his cost, to which he accepted, and brings the cause here by appeal.

If appellant, as liquidator, had no standing in court, the action of the court below was proper, and it is unnecessary to consider any other question. We take it that the office of liquidator, as alleged in the petition, performs the same functions as does the office of receiver, under our law. If so, under the authority of Mosely v. Burrow, 52 Tex. 402, he has no right to act in his official capacity outside the jurisdiction of the tribunal that appointed him. Bonner, J., delivering the opinion of the court in that case, said: "A receiver is but an officer of the court which appoints him, and it would follow, upon principle, and which is abundantly sustained by authority, that he cannot act in his official capacity outside the jurisdiction of the court by which he was appointed;" citing Booth v. Clark, 17 How. 322, which clearly lays down the same doctrine. In High, Rec. § 239, the following is enunciated as the true rule: "Upon the question of the territorial extent of a receiver's jurisdiction and powers, for the purpose of instituting actions connected with his receivership, the prevailing doctrine established by the Supreme Court of the United States, and sustained by the weight of authority in various States, is that the receiver has no extraterritorial jurisdiction or power of official action, and cannot go into a foreign State or jurisdiction, and there institute a suit for the recovery of demands due the person or estate subject to his receivership. His functions and powers, for the purpose of litigation, are held to be limited to the court of the State within which he was appointed, and the principles of comity between nations and States, which recognize the judicial decisions of one tribunal as conclusive in another, do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction." This rule applies in this State to foreign administrators and executors, when attempting to act in their official capacity; and we see no good reason why the receiver of a defunct corporation, appointed by a court of a foreign nation, should occupy a more favorable attitude before the courts of this State than they. We are of opinion that appellant was not entitled to recover, in the capacity in which he sued, and that the action of the district court, in so holding, was correct. The judgment is affirmed.

NOTE.—The rule of comity which accords to foreign corporations the privilege of maintaining suits in the local jurisdiction does not apply to the case of a receiver of such company appointed in a foreign jurisdiction. This ruling which is sustained by the weight of authority is upon the nature of the receiver's office. He is the executive arm of a court of chancery; a mere creature of the court, having no power beyond that conferred upon him by the order of his appointment and the course of practice of the court; no title and the debtor's property vests in him nor any right of possession except as he may be directed by the court; the court not he has care of the property in dispute; his appointment is a sequestration of the property confided to him, but the title is unaffected. It is like

the levy of a sort of equitable execution by which the court makes a general appropriation of the debtor's property, leaving questions of who may be finally entitled thereto to be determined thereafter; his functions as the executive arm of a court of chancery are very similar in principle to those of a sheriff of a court of common law. Manifestly such an officer cannot on principle be permitted to exercise his functions within a foreign jurisdiction any more than a sheriff can be permitted to execute process there. Murfree on Foreign Corporations, Sec. 484. On these principles it has been held by the Supreme Court of the United States in the late case of Booth v. Clark, 17 How. 322, cited in the principal case, that a foreign corporation cannot maintain an action for the recovery of a demand due to his debtor's estate. This decision has been universally followed by the Federal Courts both in the case of a receiver appointed by a foreign State Court (Hazard v. Durant, 19 Fed. Rep. 471; Holmes v. Sherwood, 16 Fed. Rep. 725), and of one appointed in a Federal Court in another State. Brigham v. Luddington, 12 Blatchf. 237; Olney v. Tanner, 10 Fed. Rep. 101. This authority has also been very generally recognized by the State Courts, and in a line of able and well reasoned decisions the right to sue in local courts has been withheld from foreign receivers. Farmers' etc. Ins. Co. v. Needles, 52 Mo. 17; Warren v. Union Nat. Bank, 7 Phil. 156; Bartlett v. Wilbur, 53 Md. 485; Day v. Postal Tel. Co., 66 Md. 354; Moseby v. Burrow, 52 Tex. 396; Ayres v. Siebold, 82 Iowa, 347, 47 N. W. Rep. 989; Hope Mut. L. Ins. Co. v. Taylor, 2 Rob. (N. Y.) 278; Hunt v. Columbian Ins. Co., 55 Me. 290; Taylor v. Columbian Ins. Co., 14 Allen, 353; Filkins v. Nunnemacher, 81 Wis. 91, 51 N. W. Rep. 79. But on the other hand cases are not wanting which take the opposing view and hold that in the comity of States foreign receivers ought to be permitted in the local courts. Bank v. McLeod, 38 Ohio St. 174; Runk v. St. John, 29 Barb. 585; Hoyt v. Thomyson, 5 N. Y. 320; Peters v. Foster, 10 N. Y. Sup. 389; Dyer v. Power, 14 N. Y. Sup. 873; Hurd v. City of Elizabeth, 41 N. J. L. 1; National Trust Co. v. Murphy, 30 N. J. Eq. 408; National Trust Co. v. Miller, 33 N. J. Eq. 155; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. Rep. 234; Metzner v. Bauer, 98 Ind. 425; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; McAlpin v. Jones, 10 La. Ann. 552; Planters' Bank v. Bass, 2 La. Ann, 430; Bagby v. Atlantic, etc. R. Co., 86 Pa. St. 291; Winans v. Gibbs & Sterrett Manf'g Co., 30 Pac. Rep. 163; Patterson v. Lynde, 112 Ill. 196; Falk v. Janes, 49 N. J. Eq. 484, 23 Atl. Rep. 813; Comstock v. Frederickson (Minn. Nov. 23, 1892,), 53 N. W. Rep. 713; Boulware v. Davis, 90 Ala. 207. But, see, Chicago, etc. R. Co. v. Keokuk, N. L. Pkt. Co., 108 Ill. 317; Iglehart v. Bierce, 36 Ill. 133; Toronto Gen. Trust Co. v. Chicago, etc. R. Co., 123 N. Y. 37, 25 N. E. Rep. 198.

A distinction however must be made where the representative of the foreign company is vested with the title of the estate. In such a case whether he is called receiver, assignee or trustee and whether he takes title by assignment (Graydon v. Church, 7 Mich. 36), or by force of the statute under which he is appointed (Relfe v. Rundle, 103 U. S. 222, 12 Cent. L. J. 130; Fry v. Charter Oak Life Ins. Co., 31 Fed. Rep. 197; Parsons v. Charter Oak Life Ins. Co., 31 Fed. Rep. 305; Rundel v. Life Assn., 10 Fed. Rep. 720; Davis v. Life Assn., 11 Fed. Rep. 781; Taylor v. Life Assn., 13 Fed. Rep. 493; Life Association v. Levy, 33 La. Ann. 1203; Bockhover v. Life Association, 77 Va. 85, 6 Am. & Eng. Corp. Cas. 603; Leipold v. Maroney, 7 Lea, 128; Lombard Bank v. Thorp, 6 Cow. 46; Willitts v. Waite, 25 N. Y. 577; Bishop v. Globe Co., 135 Mass. 132; Brigham v. Luddington, 12 Blatchf. 242 or by other appropriate means (see Chicago, etc. R. Co. v. Keokuk, etc. Pkt. Co., 108 Ill. 317; Iglehart v. Bierce, 36 Ill. 133; Cooke v. Town of Orange, 48 Conn. 401; Pond v. Cooke, 45 Conn. 126; Blake Crusher Co. v. Town of New Haven, 46 Conn. 473), he may maintain an action by virtue of his title as owner of the property and not under his authority as an officer of the court.

CORRESPONDENCE.

THE MAKING OF STATE CONSTITUTIONS.

To the Editor of the Central Law Journal:

In the JOURNAL of September 28th, 1894, are certain comments on the address of ex-Governor Russell, before the Yale Law School which may have a tendency to mislead. No one objects to the criticism of the constitution of the United States as a model of composition, and the same is true of several of the State constitutions. The government of the United States is one of delegated powers, while that of the State is unlimited in its legislative functions except where it is restricted by the constitution. This fact is so well known that it is unnecessary to cite authorities. *Magna Charta*, contains 63 sections, and the barons who forced it from King John understood the value of definite statements. It has been found expedient to prohibit special legislation in many cases, and in order to put the matter beyond question, the cases are designated, so that there is no room for construction to evade the prohibition. The attempt to require opinions to be filed in a certain time is an effort to correct an evil that is constantly increasing, viz.: the tendency to delay decisions. It is well known that certain great interests do not want cases against them decided promptly, and the extent of this influence is very great at the present time. The provision in the constitution of the Dakotas spoken of, I presume, was inserted to insure the preparation of the syllabus of each case by the judges. In some of the States a provision of statute to that effect has been declared unconstitutional. There are many courts at the present time that without either a statute or constitutional provision prepare the head-notes to the opinions in order that all parties may know just what the court considers it has decided. So far as the writer has observed there is no distrust of the people, or the legislature if it is not tampered with, but it cannot be denied that the people generally and many of the best members of every legislative body distrust the lobby that surrounds the legislature and the precautions named were no doubt taken to prevent some of the evils from such interference. "NOVICE."

BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, by A. C. Freeman and the Associate Editors of the "American Decisions." Vol. XXXVIII. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1894.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATOR—Final Settlement.—The judgment of the Probate Court on the final settlement of the administrator's accounts is conclusive only as to matters actually adjudicated by the court, and matters not thus included may be adjudicated in an action to set aside the settlement on the ground of fraud.—NELSON V. BARNETT, Mo., 27 S. W. Rep. 520.

2. ADMINISTRATION—Executors—Settlement and Accounting.—To close administration, or to relieve executors from their responsibility as such, or to change their possession as such, of any part of the estate, into possession as legatees under the will, requires the action of the Probate Court, evidenced, by order or decree showing with certainty its intention to produce such result.—IN RE SCHEFFER'S ESTATE, Minn., 59 N. W. Rep. 956.

3. ADVERSE POSSESSION—Coverture.—Where adverse possession begins in the lifetime of the ancestor, the statute continues to run against an heir who is a *feme covert* at the time of the ancestor's death.—PIM V. CITY OF ST. LOUIS, Mo., 27 S. W. Rep. 525.

4. ADVERSE POSSESSION—Paying Taxes.—The mere payment of taxes cannot create title by adverse possession.—CASHMAN V. CASHMAN'S HEIRS, Mo., 27 S. W. Rep. 549.

5. ADVERSE POSSESSION—Rights of Executor.—Where land is devised to a widow for life, conditioned that it shall be under the control of the executor, the executor cannot, without first divesting himself of the trust, claim title thereto by adverse possession, as against the remainder-men.—JONES V. SWEARINGMEN, S. Car., 19 S. E. Rep. 947.

6. APPEAL—Bill of Exceptions—Time of Filing.—The trial judge has power in vacation to extend the time for a bill of exceptions while the orginal period allowed to file it is current; but the facts that he signed it after the time expired, and that counsel for the other side marked it "O. K.," do not amount to an extension of the prescribed time.—FULKERSON V. MURDOCK, Mo., 27 S. W. Rep. 555.

7. APPEAL—Order.—Under the law of 1891, regulating appeals, an appeal will not lie from an order appointing a receiver, and directing the delivery to him of property in suit, pending litigation for an accounting in respect of said property. Such an order is not a final judgment, within the meaning of the statute cited, but is interlocutory in character. — GREELEY V. MISSOURI PAC. RY. CO., Mo., 27 S. W. Rep. 613.

8. APPEAL—Necessary Parties — Rehearing.—Where the name of one of the necessary appellees is omitted by mistake from the assignment of errors, but counsel appear for all of the appellees, and the case is decided on the merits, a rehearing will not be granted on account of the omission.—BENNETT V. SIEBERT, Ind., 37 N. E. Rep. 1071.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS—What Constitutes.—Insolvents gave a creditor a bill of sale of goods in part payment of their debt, and on the same day gave such creditor another instrument pledging certain choses in action and cotton to secure the balance of such debt, and also for an additional sum which, in consideration of the making of such pledge, such creditor agreed to pay certain other creditors of the pledgors: Held, that both instruments do not constitute an assignment for benefit of creditors.—WOOD V. ADLER-GOLDMAN COMMISSION CO., Ark., 27 S. W. Rep. 490.

10. ASSUMPSIT—Trespass.—A mere naked trespass, although creating a liability for damages, cannot be the basis of an action as on implied *assumpsit*. Such an action is not to recover damages for the tort, but to recover the value of that which the wrong-doer has appropriated to his own use, the law implying a promise to pay its reasonable value.—DOWNS V. FINNEGAN, Minn., 59 N. W. Rep. 981.

11. ATTACHMENT—Affidavit—Publication.—In attachment against a non-resident, the court can order the publication of notice to defendant before his property has been seized under the attachment. — TUFTS V. VOLKENING, Mo., 27 S. W. Rep. 522.

12. BANKS AND BANKING—Deposit of Check.—Upon a deposit being made by a customer of a bank, in the ordinary course of business, of checks, drafts, or other negotiable paper, received and credited on his account as money, and title to the check, drafts or other paper immediately becomes the property of the bank, unless a different understanding affirmatively appears.—SECURITY BANK OF MINNESOTA V. NORTHWESTERN FUEL CO., Minn., 59 N. W. Rep. 987.

13. BROKER—Commissions.— Where a loan broker brings to his principal a party able and willing to make the loan on the terms proposed, and the loan is not made, through the fault of the principal, the broker is entitled to his commissions.—MIDDLETON V. THOMPSON, Penn., 29 Atl. Rep. 796.

14. CARRIERS—Injury to Passenger.—Where a passenger on a train, who has bsen carried beyond his place of destination by reason of his being asleep, unknown to the carrier, when notice of the place was given, and the train stopped, is injured by his jumping from the train while it is in motion, being advised by a brakeman that it was not dangerous to do so, the carrier is not liable, as the giving of such advice is not a duty delegated to brakemen.—MISSOURI, K. & T. RY. CO. V. PERRY, Tex., 27 S. W. Rep. 496.

15. CARRIERS—Limiting Liability.— Rev. St. 1889, § 944, providing that a common carrier which receives goods for shipment or issues receipts or bills of lading in the State shall be liable for any loss caused by its own negligence, or that of any connecting carrier, does not prohibit a carrier from contracting with the shipper against liability beyond its own line.—MCCANN V. EDDY, Mo., 27 S. W. Rep. 541.

16. CARRIERS—Limiting Liability—Injury to Passenger.—A special contract for transporting a car load of live stock and emigrant movables, made between a railroad company and a shipper, in which it is stipulated that the shipper shall be entitled to pass upon the same train to care for, feed and water his stock, and load and unload the same, at his "own risk of personal injury, from whatever cause," is a valid con-

tract, and exonerates the railroad company from all liability for any injury to the shipper while a passenger upon such train, not caused by the gross negligence, fraud, or willful wrong of the company or its servants.—MEUER v. CHICAGO, M. & ST. P. RY. CO., S. Dak., 59 N. W. Rep. 945.

17. CARRIERS OF PASSENGERS—Operation of Passenger Elevators.—A carrier by elevator is not an insurer of the safety of his passengers, but is required to exercise the highest degree of care, as in the case of a carrier by railway or stage coach; and therefore held not error to charge in the light of the particular case, and in connection with the context, that reasonable care to prevent injury to passengers upon an elevator was "the highest degree of care consistent with the possibility of injury."—MITCHELL v. MARKER, U. S. C. C. of App., 62 Fed. Rep. 139.

18. CONFLICT OF LAWS—Assignment for Creditors.—An assignment for the benefit of creditors by a debtor residing in North Dakato, where all his property and business were, to an assignee residing in this State, was executed in this State so far as signing, sealing, and delivering, and was then taken to and recorded in North Dakota, as required by the law of that State to make such assignments effectual, and the assignee took possession there of the assigned property, and afterwards brought into this State money, its proceeds: Held, the statute of this State regulating assignments for the benefit of creditors does not apply to such as may be executed here by non-residents, who have no property and no place of business in this State, and the trusts created by which are to be carried out elsewhere.—MCKIBBIN N. ELLINGSON, Minn., 59 N. W. Rep. 1003.

19. CONFLICT OF LAWS—Breach of Covenants.—Where land situate in the State of Iowa was sold, and the conveyance therefor was executed, in the State of Nebraska, and there had been several prior conveyances, each of which contained a covenant of warranty against incumbrance, and of each of which there was the same existing breach, held, that the law of Iowa, or the law of the place in which the land is situate, will govern the rights of the parties in the enforcement of the covenant, in so far as it relates to the question of the covenant running with the land.—RILEY v. BURROUGHS, Neb., 59 N. W. Rep. 929.

20. CONFLICT OF LAWS—Promise to Accept Draft.—Where a promise is made in one State to accept a draft payable in another State, the law of the State where the draft is made determines the validity of the contract; and it is immaterial that, by the statutes of the State where the draft is payable, a promise to accept must be in writing, to be deemed an actual acceptance, and, if not in writing, can be enforced only by the person who draws or negotiates the bill.—EXCHANGE BANK v. HUBBARD, U. S. C. C. of App., 62 Fed. Rep. 112.

21. CONFLICT OF LAWS—Suit by Married Woman.—Where a married woman, a resident of one State, enters into a contract in another State, to take effect in that State, which though valid there, is invalid in her own State, and the latter State afterwards empowers her to make such a contract, the contract may be there sued on.—CASE v. DODGE, R. I., 29 Atl. Rep. 785.

22. CONSTITUTIONAL LAW — When Public.—Under Const. art. 4, §§ 23, 27, which provide that, in all cases where a general law can be made applicable, all laws shall be general and of uniform operation, and that every statute shall be a public law unless otherwise declared in the statute itself, Act April 8, 1885, to reimburse a certain township trustee, by taxation of the township, for money lost by him by the failure of a bank in which it was deposited, in which there is nothing declaring it to be a private act, is a public act.—MCCLELLAND v. STATE, Ind., 37 N. E. Rep. 1089.

23. CONSTITUTIONAL LAW—Permanent School Fund.—The prohibition of section 9, article 8, of the constitution against the transfer of the permanent school fund to any other fund is an express limitation upon the powers of the legislature; and the restraint thus imposed cannot be disregarded upon the pretense of a supposed necessity resulting from a change of conditions, or in deference to the judgment of the legislature.—STATE v. BARTLEY, Neb., 59 N. W. Rep. 907.

24. CONTRACTS — Advertisements—Lowest Bidders.—An advertisement for bids for the erection of a public school building declared that the board reserved the right to reject any or all bids. It was a rule of the board, however, that all contracts should be let "to the lowest and best bidder." Plaintiff submitted a bid, which was the lowest, for the erection of the building; but the board awarded the work to another: Held, that plaintiff had no cause of action, even if the board acted "arbitrarily and capriciously, and through favoritism," in awarding the contract.—ANDERSON v. BOARD, ETC., OF PUBLIC SCHOOLS, Mo., 27 S. W. Rep. 610.

25. CONTRACT — Liquidated Damages or Penalty.—When parties to a contract stipulate that in case of a violation thereof the party making default shall pay to the other a stipulated sum, the courts will take the sum so fixed as the innocent party's measure of damages only when it appears that to do so will no more than compensate his losses.—GILLILAN v. ROLLINS, Neb., 59 N. W. Rep. 893.

26. CONTRACT OF SCHOOL TEACHER—Closing of School.—Where one employed to teach in a public school for a certain time is able and willing to teach during that time, the fact that the school was necessarily closed part of the time by order of the board of health, because of the prevalence of a contagious disease among the pupils, does not deprive the teacher of the right to compensation for the entire time, since such closing of the schools is not caused by the act of God.—GEAR v. GRAY, Ind., 37 N. E. Rep. 1059.

27. CONTRACT—Rescission—Fraud.—Where a woman is unable to read English, and but little acquainted with business, a fraudulent misrepresentation of the contents and effect of a contract, and a false and fraudulent statement that her husband had sent the party to tell her to sign it, and that it was all right, if she be thereby induced to sign it without knowing its contents and effect, the contract may be rescinded for fraud.—ADOLPH v. MINNEAPOLIS & P. RY. CO., Minn., 59 N. W. Rep. 959.

28. CORPORATIONS — Liability of Stockholders.—The articles of incorporation of the defendant corporation construed, and held it was not organized for the purpose of carrying on an exclusively manufacturing business, and its stockholders are liable for its debts to the amount of their stock.—FIRST NAT. BANK OF WINONA v. WINONA PLOW CO., Minn., 59 N. W. Rep. 997.

29. COUNTY—Apportionment of Debt —When a county is divided by act of the legislature, and said act contains a provision that the boards of commissioners of the counties so created shall apportion a debt that may exist, to ascertain what portion each shall pay, held, that it is a perpetual, continuing duty, incumbent upon the commissioners then in office and their successors, until it is performed, and that a right of action does not abate by reason of the persons holding the office of commissioners refusing or neglecting to perform such duty during their term.—ELMORE COUNTY v. ALTURAS COUNTY, Idaho, 37 Pac. Rep. 349.

30. COUNTY CLERK — Fees.—A county clerk has no authority to charge for official services less than the fees prescribed by statute.—STATE v. HAZELET, Neb., 59 N. W. Rep. 891.

31. CRIMINAL EVIDENCE — Arson.—On the separate trial of a defendant indicted jointly with the owner of a building for burning the same, in the absence of any evidence connecting such defendant with the owner in any way, evidence that the building was insured is inadmissible.—PEOPLE v. SCOTT, Utah, 37 Pac. Rep. 335.

32. CRIMINAL EVIDENCE — Evidence of Character.—Where a person accused of crime introduces evidence

of his good charater or reputation, it is not competent for the prosecution to put in evidence specific facts tending to prove it to be bad.—PATTERSON V. STATE, Neb., 59 N. W. Rep. 917.

33. CRIMINAL EVIDENCE — Housebreaking — Recent Possession.—On a trial for housebreaking, where it is shown that a pistol taken from the house broken into was found in defendant's possession six hours later, the fact that defendant makes no statement explaining his possession of the pistol raises no presumption against him.—PEOPLE V. HART, Utah, 37 Pac. Rep. 330.

34. CRIMINAL LAW—Forgery—Burden of Proof.—In a prosecution for the forgery of a promissory note, when the defendant admits the making of the signature, the burden is not on him to prove that he had authority. In such case the burden remains on the State to prove that it was without authority, before a conviction can be had.—ROMANS V. STATE, Ohio, 37 N. E. Rep. 1040.

35. CRIMINAL LAW—Homicide—Alibi.—Where the defense is an alibi, it is not error to charge that the burden of showing an alibi is on defendant; but if, on the whole case, the testimony raises a reasonable doubt that defendant was present when the crime was committed, he should be acquitted.—WARE V. STATE, Ark., 27 S. W. Rep. 485.

36. CRIMINAL LAW — Instructions.—A charge, as to defendant's testimony, that "the false, improbable,' and contradictory statements of the accused, if made, in explaining suspicious circumstances against him, are evidences to be considered by the jury," was erroneous, as it assumed either that the statements were false, improbable, and contradictory, or that there was suspicious circumstances against him.—JONES V. STATE, Ark., 27 S. W. Rep. 601.

37. CRIMINAL PRACTICE — Forgery— Indictment.—Where the forms of criminal pleading are those prescribed in the Code and the requirement are that an information shall contain a statement of the offense in ordinary and concise language, an information charging forgery need not set out a copy of the instrument alleged to have been forged.—STATE V. WRIGHT, Wash., 37 Pac. Rep. 313.

38. DEED—Consideration — Undue Influence.—The consideration of a deed is open to explanation upon an issue of fraud and undue influence in obtaining it.—TAYLOR V. CROCKETT, Mo., 27 S. W. Rep. 620.

39. DEED—Description.—Where the description in a voluntary deed is not uncertain on its face, and the boundaries, though called for as the north, south, east, and west boundaries, yet, if taken as the northeast, southeast, etc., boundaries, describe a tract, though of five times the area of the deed calls for, such deed will not be held void for uncertainty as a question of law, but the identity of the land is a mixed question of law and fact for the jury.—DWYRE V. SPEER, Tex., 27 S. W. Rep. 585.

40. DESCENT—Distribution—Claim of Widow.—A husband's agreement with his wife, that, if she will join in certain deeds, he will allow her one-third of his personalty at his death, must be made the basis of a claim to be filed against his estate, and cannot be considered in a proceeding to distribute the residue.—CARROLL V. SWIFT, Ind., 37 N. E. Rep. 1061.

41. DURESS—Threats of Criminal Prosecution. —A threat of lawful arrest of a person justly amenable to criminal prosecution is not ground for cancellation of a deed, though it was executed under pressure of such threat; there being no circumstances of oppression or fraud, and no objection made for nearly three years.—GREGOR V. HYDE, U. S. C. C. of App., 65 Fed. Rep. 107.

42. EMINENT DOMAIN — Damages to Property not Taken.—Land not taken for a railroad is not damaged, unless its market value is lessened by reason of the construction of the road.—METROPOLITAN WEST SIDE EL. RY. CO. V. STICKNEY, Ill., 37 N. E. Rep. 1098.

43. EMINENT DOMAIN — Constitutional Law. — Act March, 1893 (Laws, p. 237), relating to laying out highways, provides that notice of the proceeding shall be given by posting, and, after the survey has been made and the plat and award has been filed by the viewers, the clerk shall publish a notice that the court will consider the report on a certain day, when, if any one objects to the award, the court will call a jury: Held, that the act is in violation of Const. art. 1, § 16, which provides that compensation for a taking of property for a public use shall be ascertained by a jury unless a jury is waived.— SMITH V. COCHRANE, Wash., 37 Pac. Rep. 311.

44. EVIDENCE—Statements by Employee of Party.—A statement by a railway company's section foreman, by whom a colt was found injured near the railway track, that it had been knocked off the track, made some time afterwards to the owner of the colt not in the transaction of any business with him, and not in the discharge of any duty for the company, is inadmissible in an action against the company for damages for the death of the colt for its injuries.—ST. LOUIS & S. F. RY. CO. V. MCLELLAND, U. S. C. C. of App., 62 Fed. Rep. 116.

45. FRAUDULENT CONVEYANCES—Action to set Aside. —Where a debtor fraudulently sells his property, taking the notes of the vendee therefor, which he assigns to his creditors, who did not know of the fraudulent sale, as collateral security, such creditors cannot avoid the sale unless they return, or offer to return, the notes before suit or at the trial.—BOWDEN V. SPELLMAN, Ark., 27 S. W. Rep. 602.

46. FEDERAL COURTS—Conflicting State and Federal Jurisdiction.—The appointment by a State court of a receiver of the property of an insolvent bank does not prevent a Federal Court from entertaining a suit to set aside conveyances to the bank, as void as against the grantor's judgment creditors; nor does the sale by the receiver of the property so conveyed, made after such suit is brought, and the possession by the State court of the proceeds of such sale, defeat the jurisdiction of the Federal Court over the respective rights of such creditors and the bank, although it may effect the nature and extent of the remedy.—BACON V. HARRIS, U. S. C. C. (Iowa), 62 Fed. Rep. 99.

47. FEDERAL COURTS — Following State Decisions—Riparian Rights.—The right of an owner of land on one side of a navigable river, which forms the boundary between two States, and make a new bank for the river, or, by artificial structure, to turn the waters upon land on the opposite side of the river, is not a local question, but one depending for determination on the general principles of the law, on which decisions of the State courts are not binding on the Federal Courts.—CAIRO, V. & C. RY. CO. V. BREVOORT, U. S. C. C. (Ind.), 62 Fed. 129.

48. GARNISHMENT — Debt Due by Receiver.—An indebtedness incurred by the receivers of a railway company, appointed by the Federal Court, while operating the road under the authority of the court, may be garnisheed in a State court.—IRWIN V. MCKECHNIE, Minn., 59 N. W. Rep. 987.

49. GUARANTY— Notes — Laches.—Three promissory notes payable to the plaintiffs were executed and delivered to plaintiffs by C and S, and secured by chattel mortgage. Before the notes were delivered, the defendants indorsed upon each note a guaranty of collection, as follows: "For value received, we hereby guaranty the collection of the within note. Laughlin, Palmer & Co." Held, construing section 4280, Comp. Laws, that by this form of guaranty the defendants undertook only that the makers of the notes were solvent when the guaranty was entered into, and that the notes were "collectible by the usual legal proceedings, if taken with reasonable diligence." — ROBERTS, THORP & CO. V. LAUGHLIN, N. Dak., 59 N. W. Rep. 967.

50. HOMESTEAD.—Where the statute provides that in case a debtor is the head of a family a homestead to be selected by him shall be exempt from execution, and does not forbid the sale of the same by him, a husband can convey his homestead without the wife's con-

sent, subject only to her dower right on his death.—COOK V. HIGLEY, Utah, 37 Pac. Rep. 336.

51. HOMESTEAD—Estoppel to Claim.—Under Const' art. 16, § 51, requiring a homestead to be used for the purpose of a home, or as a place for the head of the family to exercise his business or calling, it is error to charge that a tract of land used openly and notoriously as a means of support and maintenance of a family is a homestead, even if the family live on another tract.—HASWELL V. FORBES, Tex., 27 S. W. Rep. 566.

52. HOMESTEAD RIGHT — Transfer of Property to Wife.—Where a husband has legally selected and recorded a homestead, the homestead right is not destroyed by the fact that, subsequently thereto, personal property of the husband not included in the declarations is transferred by him to his wife in payment of paraphernal funds of hers received by him and converted to his own use, thus placing this property beyond the reach of his creditors. The constitution contemplates the possibility of the co existence of ownership of paraphernal property by the wife with a homestead right in the husband where the value of the property of the wife is within the limit fixed by it.—SPENCER V. SCOTT, La., 15 south. Rep. 706.

53. INSURANCE POLICY—Construction.—Where a policy insures a furniture company in the sum of $1,000, and the amounts for which the factory, machinery, apparatus, and furniture are insured are separately stated, and permission is granted to assured to erect a warehouse, "to be insured under the policy," the separate items constitute separate contracts of insurance, and the warehouse subsequently constructed is not insured.—NAPPANEE FURNITURE CO. V. VERNON INS. CO., Ind., 37 N. E. Rep. 1064.

54. INTOXICATING LIQUORS — Sale without License.—Where a statute authorizes a city to collect a license tax on liquor sellers, the power to punish them for selling without a license is implied.—CITY OF WARRENSBURG V. MCHUGH, Mo., 27 S. W. Rep. 523.

55. INTOXICATING LIQUORS—Saloon—Sunday.—Under the ordinance of the city of Minneapolis requiring saloons and places where intoxicating liquors are sold to be closed and kept closed on Sundays, the owner is *prima facie* responsible for such place being open on Sunday, whether he is present or not.—STATE V. O'CONNOR, Minn., 59 N. W. Rep. 999.

56. JUDGMENT—Fraud.—A court of equity will not set aside a judgment for fraud unless the fraud is extrinsic or collateral to the matter involved on the former trial.—IRVINE V. LEYH, Mo., 27 S. W. Rep. 512.

57. JUSTICE OF THE PEACE—Fees—Liability of County.—No liability rests upon a county, as such, to pay the fees of a justice of the peace in criminal cases, unless such liability is created by statute; but it is not necessary that the statute should in direct terms require the county to pay such fees if it clearly and unmistakably appears from what has been enacted that such was the legislative intent.—BARRETT V. STUTSMAN CO., N. Dak., 59 N. W. Rep. 964.

58. LANDLORD AND TENANT—Forfeiture of Lease.—Where an action is commenced in a court of law for forfeiture of a lease, and the answer contains matter for equitable relief, and the case is transferred to a court of equity by consent of the parties, the case must be decided according to the rules of equity, and not those of law, though plaintiff had the right to try such case in a court of law.—LITTLE ROCK GRANITE CO. V. SHALL, Ark., 27 S. W. Rep. 562.

59. LANDLORD AND TENANT—Oral Lease—Statute of Frauds.—Where a tenant takes possession and pays rent under an oral lease void under the statute o frauds, a tenancy from month to month is created, which if regulated by the provisions of the lease in every respect except as to the term.—MARR V. RAY, Ill., 37 N. E. Rep. 1029.

60. LANDLORD AND TENANT—Possession—Damages.—In a suit by a tenant against a landlord to recover damages for failure of the latter to deliver possession of the leased premises adcording to contract, the measure of damages generally is the difference between the rent agreed upon and the value of the premises to the tenant for the terms and such other damages as result directly and necessarily as the natural consequence of the breach of the contract, and are capable of being estimated by reliable data.—HODGES V. FRIES, Fla., 29 Atl. Rep. 682.

61. LIMITATION OF ACTIONS—Acknowledgment.—An insolvent firm wrote to plaintiff, a creditor, that they could not hope to pay their debts, but would sell their homes, "provided our creditors will accept 20 cents on the dollar in full satisfaction." Subsequently they wrote: "The majority of our creditors have accepted the proposition, but we cannot make any settlement except one that embraces all." Finally they wrote: "Regarding the amount of our account, we beg to say, whatever that may be will be the basis of settlement. As soon as all our creditors come in, we will proceed at once to make settlement:" Held, not such an admission of the debt and promise to pay as would take the debt out of the statute of limitations.—REYNOLDS IRON WORKS V. MITCHELL, Tex., 27 S. W. Rep. 508.

62. LIMITATION OF ACTION—Pleading.—Where the complaint alleges the date when a cause of action accrued, showing that it was within the time within which, under the statute of limitations, an action may be brought, and the answer alleges that the cause of action did not accrue within that time, a reply is not necessary.—WEST V. HENNESSY, Minn., 59 N. W. Rep. 984.

63. MANDAMUS—Payment of Town Warrants.—Where one loans money to a town, and receives warrants therefor, his proper remedy on the refusal to pay the warrants is by *mandamus* to compel payment thereof, and not by action on the warrants.—CLOUD V. TOWN OF SUMAS, Wash., 37 Pac. Rep. 305.

64. MARRIAGE—Common Law Marriage.—A common law marriage is not established by proof of cohabitation alone, where the parties do not hold each other out as husband and wife.—STANS V. BARTEY, Wash., 37 Pac. Rep. 316.

65. MASTER AND SERVANT — Negligence.—A servant assumes no risk of a latent defect in a crane chain, not discoverable in the ordinary and proper use of the chain.—NICHOLDS V. CRYSTAL PLATE-GLASS CO., Mo., 27 S. W. Rep. 516.

66. MASTER AND SERVANT—Negligence.—In an action by a servant against his master for personal injuries, caused by the fall of a pile of dirt, a complaint which alleges that the master had knowledge that the dirt was in danger of falling, and carelessly failed to notify the servant of that fact, without showing by direct allegation or necessary inference that the injuries sued for were the result of the master's negligence, is demurrable.—PEERLESS STONE CO. V. WRAY, Ind., 37 N. E. Rep. 1058.

67. MASTER AND SERVANT—Negligence of Fellow-Servant.—A laborer, employed in building a bridge, and an engineer, operating the hoisting machinery for its construction, are fellow-servants where both belong to the same working force, under the orders of the same foreman; and the master is not liable for an injury to the laborer from the negligence of the engineer.—RYAN V. MCCULLY, Mo., 27 S. W. Rep. 533.

68. MASTER AND SERVANT—Negligence—Pleading.—In such actions, where negligence is the basis of recovery, it is not necessary for the plaintiff, in her declaration, to set out the facts constituting the negligence, but an allegation, of sufficient acts, the doing of which caused the injury, and, an averment that such acts were negligently and carelessly done, will be sufficient.—WALSH V. WESTERN RY. CO. OF FLORIDA, Fla., 15 South. Rep. 686.

69. MASTER AND SERVANT—Scope of Employment.—A railroad company is not liable for injuries received by one not an employee, while riding on its hand car, on which the foreman in charge was forbidden to take

any one but an employee.—HOUSTON, C. A. & N. RY. CO. v. BOLLING, Ark., 27 S. W. Rep. 492.

70. MASTER AND SERVANT — Vice-principal — Negligence.—A person who has charge of a mill yard, whose duty it is to superintend the piling of lumber therein, and under whose orders are the workmen engaged in the piling, and who does none of it himself, is a vice-principal, though, in hiring and discharging workmen, he reports to the general superintendent, and obtains his sanction therefor, and occasionally renders services as tallyman in measuring lumber.—ZINTEK v. STIMSON MILL CO., Wash., 37 Pac. Rep. 340.

71. MECHANIC'S LIEN—Assignment—Effect.—The fact that a person entitled to a mechanic's lien assigns his claim against the owner of the land as collateral security does not defeat his right to claim the lien.—POTVIN v. DENNY HOTEL CO. OF SEATTLE, Wash., 37 Pac. Rep. 320.

72. MECHANICS' LIENS — Erroneous Recordation—Effect.—Under Rev. St. 1894, § 7257, the filing with the recorder of notice of intention to hold a mechanic's lien perfects the lien, and the fact that the recorder records it in the mechanic's lien record, instead of in the miscellaneous record book, as required by section 7258, does not affect the lien.—LEEPER v. MYERS, Ind., 37 N. E. Rep. 1070.

73. MECHANIC'S LIEN — Foreclosure — Jurisdiction.—Where an act conferring on a county court jurisdiction of suits to foreclose mechanics' liens is repealed without any saving clause, a foreclosure sale made after such repeal, in pursuance of a decree rendered by said court before the repeal, is void.—HOLCOMB v. BOYNTON, Ill., 37 N. E. Rep. 1031.

74. MORTGAGE — Foreclosure—Default in Interest.—Where a trust deed gives the holder of the secured notes the option to declare the whole debt due on failure to pay any one of the notes, his determination to file a bill to foreclose for the entire debt, and his action in causing the bill to be prepared and filed, is a sufficient election to declare the whole debt due.—BROWN v. MCKAY, Ill., 37 N. E. Rep. 1037.

75. MORTGAGE— Foreclosure Sale — Deed. — Under Rev. St. ch 77, § 30, which declares that a purchaser of land at foreclosure sale may, if there is no redemption, obtain a deed at any time within five years after the time for redemption expires, and that, if no deed is obtained within that time, the certificate of sale shall be null and void, a purchaser who neglects to take out a deed within such time cannot thereafter assert any title to the land, either at law or in equity, through his purchase.—SEEBERGER v. WEINBURG, Ill., 37 N. E. Rep. 1033.

76. MORTGAGES — Notice of Foreclosure.—When a mortgage with power of sale covers several separate, distinct tracts of land, lying in different counties, the notice of foreclosure sale need be published only in a newspaper in any one of such counties.—PAULLE v. WALLIS, Minn., 59 N. W. Rep. 999.

77. MORTGAGE—Payment of Tax—Invalid Agreement.—Under Const. art. 13, § 5, which provides that all contracts requiring the mortgagor to pay any tax on the mortgage shall be void as to any interest specified therein, and as to such tax, a provision in a mortgage that the mortgagee may include in the mortgage all taxes and assessment son the premises,"including taxes on the interest of the mortgagee therein by reason of the mortgage," renders the mortgage void as to the interest on the notes secured thereby.—GARMS v. JENSEN, Cal., 37 Pac. Rep. 337.

78. MORTGAGE — Purchase of Tax Title.—Where a mortgagor is disabled to defeat the mortgage by acquiring a tax title, his grantee will stand in no better position.—MACEWEN v. BEARD, Minn., 59 N. W. Rep. 942.

79. MUNICIPAL CORPORATION—Action against City.—Section 36 of the charters of cities of the first class, requiring, in order to maintain an action against the city for an unliquidated claim, that the claimant shall, within three months from the time such right of action accrues, file with the city clerk a statement of the time, place, and circumstance of the injury and damage, is a reasonable exercise of the legislative power, and the filing of such a statement is a condition precedent, and must be alleged and proved, in order to maintain an action.—CITY OF LINCOEN v. FINKLE, Neb., 59 N. W. Rep. 915.

80. MUNICIPAL CORPORATIONS — Boulevard — Estoppel.—Where a city has relinquished control of a street to incorporated park commissioners, and they have had undisturbed possession and control for more than 12 years, and have expended large sums of money in improving it as a boulevard, their right to such street cannot be questioned on the ground that the transfer by the city was informal, since the city and all other persons are estopped by their long acquiescence.—CHICAGO & N. W. RY. CO. v. WEST CHICAGO PARK COM'RS., Ill., 37 N. E. Rep. 1079.

81. MUNICIPAL CORPORATION — Change of Street Grade —Damages. — A city is not liable for damages from a change of grade of a street to improvements put on the property of an abutting owner after such grade had been established, but only for damages to the property, irrespective of the improvements. — KLINKINGBEARD v. CITY OF ST. JOSEPH, Mo., 27 S. W. Rep. 521.

82. MUNICIPAL CORPORATIONS—Control of Streets.—Where a city has repeatedly allowed property owners to erect buildings projecting into the streets, but has in each case required the plan of the proposed projection to be presented to and approved by the city authorities before it was allowed to be built, the citizens do not thereby acquire any right to build such projections without permission.— MCCORMICK v. SOUTH PARK COMRS., Ill., 37 N. E. Rep. 1075.

83. MUNICIPAL CORPORATIONS—Failure to Take Bond of Contractors.—The duty imposed by the charter of the City of Duluth upon the board of public works to take a bond for the security of laborers and material men when letting a contract for a public improvement is not a municipal or corporate duty, and the city is not liable for failure to take the bond.—INK v. CITY OF DULUTH, Minn., 59 N. W. Rep. 960.

84. MUNICIPAL CORPORATION—Incorporation.—Where the existence of a municipal corporation is not questioned by the State, it cannot be put in issue by a private individual in a collateral proceeding.—STATE v. WHITNEY, Neb., 59 N. W. Rep. 884.

85. MUNICIPAL CORPORATIONS — Ordinances. — The legislature may delegate to municipal corporations power to adopt and enforce ordinances of special local importance, though general statutes exist relating to the same subjects.—CITY OF MONROE v. HARDY, La., 15 South. Rep. 696.

86. MUNICIPAL CORPORATIONS—Paving Assessments.—Where the city council, by ordinance, authorizes its mayor to enter into a contract for paving a street, whereby the contractor is to acquire a lien on the abutting property, the mayor can only bind the city according to the authority given him.—STATE v. COMMON COUNCIL OF MICHIGAN CITY, Ind., 37 N. E. Rep. 1041.

87. MUNICIPAL CORPORATION—Public Improvements.—A record that a resolution and order for advertisements for bids, "the yeas and nays being taken under the general rule, were unanimously adopted by a full vote of the council," shows a compliance with the statute (Rev. St. 1881, § 3099; Rev. St. 1894, § 3534), requiring that "the yeas and nays shall be taken and entered on the record," substantial as against collateral attack by an owner whose property is benefited by the improvement ordained.— NEW ALBANY GASLIGHT & COKE CO. v. CRUMBO, Ind., 37 N. E. Rep. 1062.

88. MUNICIPAL CORPORATION—Standpipe in Street.—A city has no right to erect a standpipe in a public street, even though the fee of the street is in the city, since such use of the street is inconsistent with the

objects for which streets are established.—BARROWS v. CITY OF SYCAMORE, Ill., 37 N. E. Rep. 1096.

89. MUTUAL BENEFIT INSURANCE — Misstatements in Application.—The rule laid down in Kausal v. Association, 16 N. W. Rep. 430, 31 Minn. 17, that agents of an insurance company authorized to procure applications for insurance, and to forward them to the company for acceptance, must be deemed the agents of the insurers in all that they do in preparing the application, or in any representations they may make as to the character or effect of the statements therein contained, held to apply in the case of a mutual benefit association organized for the purpose of idemnifying its members on account of accidents occurring to them, the necessary money being raised solely by assessments upon said members.— WHITNEY v. NATIONAL MASONIC ACC. ASS'N, Minn., 59 N. W. Rep. 943.

90. NEGOTIABLE INSTRUMENT—Note—Bona Fide Purchaser.—A person to whom a note is indorsed as security for an undertaking entered into at the time of the pledge is a *bona fide* purchaser.— PETERS v. GAY, Wash., 37 Pac. Rep. 325.

91. NEGOTIABLE INSTRUMENT—Promissory Note—Negotiability.—A note, secured by a chattel mortgage, attached thereto, on a cotton crop, providing for delivery to the mortgagee of the entire crop as rapidly as it could be prepared for market, to be sold by him, as agent of the maker, and the proceeds applied on the note, is not negotiable. —COMMERCIAL BANK OF SELMA v. CRENSHAW, Ala., 15 South. Rep. 741.

92. NEGOTIABLE INSTRUMENT— Suit on Day of Maturity.— A note without grace, made payable in a bank, placed and remaining therein for collection until due, may be sued upon after banking hours on the evening of the day it falls due, where the opening and closing hours are well known to the maker.—SABINE v. BURKE, Idaho, 37 Pac. Rep. 352.

93. OFFICERS— Compensation.—A deputy appointed by an officer, to hold during the pleasure of such principal, does not hold for a "term," within the meaning of section 8, art. 12, of the constitution, prohibiting any change in the compensation of any public officer "during his term of office."—SOMERS v. STATE, S. Dak., 59 N. W. Rep. 962.

94. PARTNERSHIP — Authority of Partner.—The authority of one partner to bind the firm is governed by the law of agency. Within the range of the firm business, one may act for all, as to persons having no notice of any limitations on the implied authority. Beyond the scope of the partnership, one partner may bind the other, where the latter would be bound under the general law of principal and agent.—MIDLAND NAT. BANK v. SCHOEN, Mo., 27 S. W. Rep. 547.

95. PARTNERSHIP—Dower. — Partnership capital invested in land for the benefit of the company will be treated as personalty, and not subject to dower or inheritance, until it has performed all its functions to the partnership, and thereby ceases to be partnership capital.—WOODWARD-HOLMES CO. v. NUDD, Minn., 59 N. W. Rep. 1010.

96. PARTITION—Action by Life Tenant.—A life tenant and a remainder-man may maintain partition against the other remainder-men, though there is a contingent estate in the land, which may afterwards be vested in persons not *in esse*.—SIKEMEIR v. GALVIN, Mo., 27 S. W. Rep. 551.

97. PARTITION—Claim for Rents and Profits.—In an action for partition, and for rents and profits, and damages caused by waste, defendants may plead as a set-off expenses incurred in making necessary repairs of buildings and fences, and sums expended at plaintiff's request in defending the title to the premises.—BLACKWELL v. MCLEAN, Wash., 37 Pac. Rep. 317.

98. PLEADINGS — Frivolous Answer.—An answer is frivolous which contains no new matter, and which attempts to deny material allegations in the complaint only as follows: "Defendant says that it has not information sufficient to form belief," etc. A denial in this form must negative both knowledge and information sufficient to form a belief.—SIGMUND v. BANK OF MINOT, N. Dak., 59 N. W. Rep. 966.

99. PLEDGE—Deposit with Third Person.—A debtor who deposits with a third party pledges for his creditor, presumably purchased with trust funds, and who informs the creditor of the deposit, who accepts the third party as a depositary, loses control and possession of said pledge. The depositary holds the pledge for the benefit of the pledgee. That the third party is the clerk of the pledgor does not destroy the effect of the pledge.—SUCCESSION OF LANAUX, La., 15 South. Rep. 708.

100. POWER OF ATTORNEY—Revocation.—A power of attorney executed by A, empowering B to sell and convey real and personal estate and pay the proceeds to C, to be applied in payment of a debt from A to C existing or contemplated at the time of its execution, and executed by A and accepted by C as security for such debt, cannot be revoked by A.—AMERICAN LOAN & TRUST CO. v. BILLINGS, Minn., 59 N. W. Rep. 998.

101. QUO WARRANTO — Trial by Jury.—The right of trial by jury on issues purely of fact, arising in proceedings by information in the nature of *quo warranto*, is guarantied by the third section of the bill of rights of our constitution, which provides that the right of trial by jury shall be secured to all, and remain inviolate forever.—BUCKMAN v. STATE, Fla., 15 South. Rep. 697.

102. RAILROAD COMPANY — Accident at Crossing — Contributory Negligence.—When a traveler on a highway is struck by a train at a railroad crossing and killed, and there is no direct evidence to prove that he looked and listened, but there is evidence tending to prove that, if he had done so, he could not have seen the approaching train in time to avert a collision, the question of his contributory negligence is for the jury. —STRUCK v. CHICAGO, M. & ST. P. RY. CO., Minn., 59 N. W. Rep. 1022.

103. RAILROAD COMPANY—Fires Set by Locomotives—Damages.—If two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of these parties can be held responsible for resulting damages in case the fires mingle and concurrently destroy property.—MCCLELLAN v. ST. PAUL, M. & M. RY. CO., Minn., 59 N. W. Rep. 978.

104. RAILROAD COMPANY—Injuries at Crossing—Contributory Negligence.—The mere fact that a person uses a railway crossing which he knows to be defective—it being the only crossing accessible to him—does not necessarily render him guilty of negligence.—INTERNATIONAL & G. N. RY. CO. v. ROBERTSON, Tex., 27 S. W. Rep. 564.

105. RAILROAD COMPANY—Negligence.—Contributory negligence is a matter of defense, and the burden of its pooof is on the defendant. If the plaintiff proves his case without disclosing any contributory negligence, he will be assumed to be free therefrom. — UNION STOCK YARDS CO. OF OMAHA v. CONOYER, Neb., 59 N. W. Rep. 951.

106. RAILROAD COMPANY—Occupation of Land—Easement.—Where a railway company enters and constructs railway tracks on land under a mere license from the owner, it acquires no easement in the land. The landowner may revoke the license, and bring ejectment, which the railroad company may, under the statute, convert into condemnation proceedings.— MINNEAPOLIS WESTERN RY. CO. v. MINNEAPOLIS & ST. L. RY. CO., Minn., 59 N. W. Rep. 983.

107. RAILROAD COMPANY — Street Cars—Collision.— Plaintiff drove along defendant's street car track, and a cable car followed on closely behind, under perfect control, giving constant signals of its approach. Plaintiff, after passing round a team which had prevented his driving between the track and the sidewalk, turned to leave the track without increasing his speed, and was struck by the car: Held, that whether de-

fendant's employees were negligent in running too close or not stopping to give plaintiff time to get off was for the jury.—HICKS v. CITIZENS' RY. CO., Mo., 27 S. W. Rep. 542.

108. RAILROAD COMPANY—Street Railways—Negligence and Contributory Negligence.—In an action for personal injuries sustained by an eight year old child by being run over by a cable car while playing on the track, there was some evidence that the gripman did not keep a proper lookout in front, and that he might have stopped the car, if the brakes were in proper condition, sooner than he did: Held, that the questions of negligence and contributory negligence were for the jury.—MITCHELL v. TACOMA RAILWAY & MOTOR CO., Wash., 37 Pac. Rep. 341.

109. SALE—Apportionment of Deliveries.—A contract for the sale of the entire output of certain coal mines, at prices payable in monthly installments, for the coal at the mines, the buyer agreeing to ship and pay for at least a certain quantity per annum, provided so much is furnished him, cannot be construed, because of circumstances existing when it was made, to require him to take the coal monthly, in such quantities as to keep the seller's works and workmen reasonably employed, as they had customarily been and were at the time of the contract, thus imposing on him a distinct and unexpressed obligation.— SHIPMAN v. SALTSBURG COAL CO., U. S. C. C. of App., 62 Fed. Rep. 145.

110. TAXATION—Exemptions—Special Assessments.—The exemptions provided by section 2, art. 9, of the constitution of Nebraska, are solely with reference to taxes assessed by valuation for general purposes, and have no applicability to special assessments, or special taxation of property benefited, for local improvements, under authority of section 6 of the same article.—CITY OF BEATRICE v. BRETHREN CHURCH, Neb., 59 N. W. Rep. 932.

111. TAXATION — Mining Claim — Fixtures.—Under 1 Comp. Laws, § 2009, providing that "mining claims" are not taxable, an engine and boiler built into a brick foundation, and firmly affixed by bolts leaded down and used in working a mine, are part of a mining claim, and not taxable.—MAMMOTH MIN. CO. v. JUAB COUNTY, Utah, 37 Pac. Rep. 348.

112. TAXATION — Publication—Verification.—In tax proceedings against unknown parties, the facts authorizing notice by publication, under Missouri law, must be verified; otherwise, no jurisdiction is acquired as to such parties. As to them, it is not sufficient to allege merely their non-residence, in obtaining an order of publication. But such an allegation is sufficient as to named defendants.—ROHRER v. ODER, Mo., 27 S. W. Rep. 606.

113. TRADE-MARKS—Infringement.—On motion for a preliminary injunction in a suit between citizens of the same State for infringement of a registered trademark, the affidavits showed that the trade-mark was invalid because anticipated: Held, that an injunction should not be granted, although the affidavits disclosed a case of unfair competition, the jurisdiction to retain the case as to that matter being doubtful.—GOLDSTEIN v. WHELAN, U. S. C. C. (N. Y.), 62 Fed. Rep. 124.

114. TRIAL—Misconduct of Jury.—In a case in ejectment, where the signatures to certain deeds purporting to convey the land in controversy are in dispute, and a note, obviously signed by the alleged forger of the said deeds, and not admitted and read in evidence, is allowed, accidentally or otherwise, to be taken into the jury room, remaining in the hands of the jury during their consideration of the verdict, it is fair to assume, unless definitely demonstrated to the contrary, that such note, with its signature, was considered and examined by the jury; and its admission to the jury room was prejudicial to the party against whom the verdict was rendered, and calls for a reversal of the verdict, and a new trial of the cause.—LA BONTY v. LUNDGREN, Neb., 59 N. W. Rep. 904.

115. TRUST—Implied Trust.—A landowner conveyed, as a gift, to his son-in-law, a tract of land in consideration of his affection for the wife of the latter, his daughter: Held, that no express or implied trust was thereby created in favor of the wife, or her heirs, as against the grantee, her husband.—HIGBEE v. HIGBEE, Mo., 27 S. W. Rep. 619.

116. TRUSTS—Limitation.—A deed to a trustee whereby he covenants to all the *cestui que trust* full enjoyment of the premises, with all the rents, profits, and proceeds, for her sole use and benefit; and, at the written request of said *cestui que trust*, to sell, mortgage, convey, lease, or otherwise dispose of the premises, and to pay over the net issues or proceeds to said *cestui que trust* as she may direct; and, at her death, to convey the premises or proceeds in his hands as she may by will or other writing direct,—creates an executed dry trust, and vests in the *cestui que trust* an equitable fee, on which no remainder can be limited, in default of her appointment.—CORNWELL v. ORTON, Mo., 27 S. W. Rep. 536.

117. TRUST — Resulting Trust. — A contribution of money towards the entire purchase of land is not sufficient to create a resulting trust in favor of the contributor unless the contribution is shown to have been paid for some specific part of the land.—O'DONNELL v. WHITE, R. I., 29 Atl. Rep. 769.

118. USURY — Commissions of Agents. — Where a money lender intrusts the entire management of his business to a general agent, with unlimited authority to conduct it according to his own discretion, and with the understanding that he shall obtain the compensation for his services as agent from the borrowers, in the form of *bonus* or commission, if the agent exacts from a borrower a *bonus* or commission which together with the interest reserved in the contract, amounts to more than the maximum rate of interest allowed by law, the transaction is usurious.—HALL v. MAUDLIN, Minn., 59 N. W. Rep. 985.

119. VENDOR AND VENDEE—Application of Payments.—A vendor having a lien for unpaid price may pay the taxes, when allowed by the purchaser in possession to become delinquent, and recover them as a part of the lien debt.—BROWN v. BROWN, Mo., 27 S. W. Rep. 552.

120. VENDOR AND VENDEE — Mortgage — Assumption Clause.—Plaintiff contracted to sell land to L and W. Defendant then contracted with L to buy his interest, which contract L assigned to W. Plaintiff then deeded the whole tract to W, subject to a mortgage thereon, in which deed was a clause stating that W assumed and agreed to pay the mortgage. W then made a deed to one-half the land to defendant, placed it on record, and notified defendant thereof. The deed contained an assumption clause for half the mortgage debt, but defendant did not authorize its insertion, or see the deed, and, as soon as notified of it, repudiated it, and made and recorded a deed of his interest back to W: Held, that defendant was not personally liable on the assumption clause.—METZGER v. HUNTINGTON, Ind., 37 N. E. Rep. 1084.

121. WILL — Spendthrift Trust.—A testatrix devised to her son for life her one-third interest in certain land, and declared in the will: "He shall have the rents and profits arising from my interest in said property for his own use and support, but no part thereof shall be subject to payment of his debts, and he shall not incumber the same:" Held, that no trust having been created, the son's life estate was subject to levy and sale for payment of his debts.—THOMPSON v. MURPHY, Ind., 37 N. E. Rep. 1094.

122. WRONGFUL ATTACHMENT—Exemplary Damages.—Where the attachment was sued out by an attorney, exemplary damages cannot be recovered without proof that the attachment plaintiffs knew of the attorney's malice, and ratified his malicious acts.—STRAUSS v. DUNDON, Tex., 27 S. W. Rep. 503.

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